CLERK'S COPY. 3485

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. ~~1901~~ 1902.

No. ~~192~~ 36.

CLINTON E. WORDEN & CO., PETITIONER,

vs.

CALIFORNIA FIG SYRUP COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED NOVEMBER 12, 1900.
CERTIORARI AND RETURN FILED JANUARY 7, 1901.

(17,967.)

(17,967.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

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CLINTON E. WORDEN & CO., PETITIONER,

vs.

CALIFORNIA FIG SYRUP COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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No. 564

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.

CLINTON E. WORDEN & CO. (A CORPORATION), J. A. BRIGHT, T. F. BACON, C. J. SCHMELZ AND LUCIUS LITTLE,

Appellants,

VS.

CALIFORNIA FIG SYRUP COMPANY (A CORPORATION),

Appellee.

VOL. I.

(Pages 1 to 320 inclusive.)

Appeal from the United States Circuit Court, Ninth Judicial Circuit, in and for the Northern District of California.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

CLINTON E. WORDEN & CO. et al.,
Respondents and Appellants,

vs.

CALIFORNIA FIG SYRUP CO.,
Complainant and Appellee.

Order Extending Time to Docket Cause.

Good cause appearing therefor, it is hereby ordered that the respondents and appellants in the above-entitled cause may have thirty days' time, from and after the date hereof, within which to docket the cause and to file the transcript on appeal herein.

Aug. 4, 1899.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: No. 564. United States Circuit Court of Appeals, Ninth Circuit. California Fig Syrup Co., complainant, vs. Clinton E. Worden & Co. et al., defendants. Order extending time to file transcript and docket appeal.

Filed August 4, 1899. Frank D. Monckton, Clerk, by Meredith Sawyer. John H. Miller, Attorney at law, Mills building, San Francisco, Cal.

In the United States Circuit Court of Appeals for the Ninth Circuit.

CLINTON E. WORDEN & CO. et al.,
Appellants,

vs.

CALIFORNIA FIG SYRUP CO.,
Appellee.

Order Extending Time to File Record on Appeal and Docket the Cause.

Good cause appearing therefor, it is hereby ordered that the appellants' time within which to file and docket their record upon appeal herein from the Circuit Court of the United States, for the Northern District of California, be, and the same hereby is, extended to and including October 2, 1899.

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: No. 564. United States Circuit Court of Appeals, Ninth Circuit. Clinton E. Worden & Co. et al. vs. California Fig Syrup Company. Order extending time to docket cause, etc.

Filed Aug. 31, 1899. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

CLINTON E. WORDEN & CO. et al.,
Appellants,
vs.
CALIFORNIA FIG SYRUP CO.,
Appellee.

Order Extending Time to File Record on Appeal and Docket the Cause.

Good cause appearing therefor, it is hereby ordered that the appellants' time within which to file and docket their record upon appeal herein from the Circuit Court of the United States, for the Northern District of California, be, and the same hereby is, extended to and including November 1, 1899.

WM. W. MORROW,
United States Circuit Judge, for the Ninth Circuit.

[Endorsed]: No. 564. United States Circuit Court of Appeals. Clinton E. Worden & Co., appellants, vs. California Fig Syrup Co. Order extending time to file record.

Filed Oct. 2, 1899. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

CLINTON E. WORDEN & CO.,
Appellants,
vs.
CALIFORNIA FIG SYRUP CO.,
Appellee.

Stipulation as to Printing the Record.

It is hereby stipulated and agreed that the following portions of the record on appeal need not be printed and may be omitted from the printed transcript, to wit:

1. The verification of bill of complaint on page 15, and in lieu thereof may be inserted the words "duly verified."

2. Subpoena ad respondendum and the marshal's return of service on pages 16 and 17.

3. Demurrer to bill of complaint, pages 18, 19, 20, 21.

4. Order granting preliminary injunction and overruling demurrer on page 22.

5. Opinion of Court on application for preliminary injunction from and including page 23 to and including page 37.

In regard to the printing of the original exhibits it is stipulated as follows:

Complainant's Exhibits "C[2]," "C[3]," and "S," being colored advertising pamphlets, may be omitted from the printed record.

Complainant's Exhibits "K," "L," "M," "N," "O," "P," "Q," "R," "W," and "T," need not be printed in full, but may be consolidated by a general statement that the complainant published an advertisement in the periodicals named, and giving the year, which contained the following statement, and insert therein so much of the advertisement as refers to figs.

Complainant's Exhibit "J," being articles of incorporation of complainant, also Defendant's Exhibits Nos. 14[a] and 14[b] and 15 may all be omitted from the printed record.

JOHN H. MILLER,
Solicitor for appellants.
WARREN OLNEY,
Solicitor for appellee.

[Endorsed]: No. 564. United States Circuit Court of Appeals for the Ninth Circuit, Northern District of California. Clinton E. Worden & Co., appellants, vs. California Fig Syrup Co., appellee. Stipulation as to printing the record.

Filed Dec. 20, 1899. F. D. Monckton, Clerk. John H. Miller, attorney at law, Mills building, San Francisco, Cal., for appellants.

In the United States Circuit Court of Appeals for the Ninth Circuit.

CLINTON E. WORDEN & CO.,
Appellants,
vs.
CALIFORNIA FIG SYRUP CO.,
Appellee.

Notice as to Printing.

Notice to Warren Olney, counsel for appellee, and to the clerk of the above entitled Court:

You are hereby notified that the specification of errors hereunto annexed, constitutes a statement of the errors on which the appellants intend to rely on this appeal; and you are further notified that the parts of the record which the appellants think necessary for the consideration thereof, are, and constitute and comprise, the whole of the record as filed with the clerk of the Court, save and except the following parts and portions thereof, to wit:

1. Those parts and portions covered by the stipulation between counsel for the respective parties now on file with the clerk, whereby it was stipulated and agreed that the parts and portions of the record, specified in said stipulation might be omitted from the printed record.

2. The bond on appeal, appearing at pages 594 and 595 of the typewritten record.

3. The order of Court allowing withdrawal of original exhibits, appearing at page 596 of typewritten record.

4. The deposition of W. S. Dreypolcher, included between pages 251 and 254 of the typewritten record.

5. The deposition of A. B. Smith, appearing between pages 254 and 259 of the typewritten record.

6. The deposition of Henry Michaels, appearing between pages 213 and 229 of the typewritten record.

7. The deposition of W. P. Reddington, appearing between pages 229 and 251 of the typewritten record.

8. The deposition of William Pinniger, appearing between pages 449 and 456 of the typewritten record.

9. The deposition of C. J. Brochens, appearing between pages 456 and 467 of the typewritten record.

10. The deposition of J. A. Bright, appearing between pages 516 and 541 of the typewritten record.

11. The deposition of Truman F. Bacon, appearing between pages 541 and 554 of the typewritten record.

12. The deposition of Richard E. Queen, appearing between pages 554 and 559 of the typewritten record.

13. Complainant's exhibit "W," being an advertisement in the Cleveland "Press" of April 12, 1898.

14. Complainant's exhibit "T," being a newspaper article from the San Francisco "Examiner."

15. Complainant's exhibit "C," being an advertisement from the Cleveland "Leader" of February 1, 1896.

16. Complainant's exhibit "C^1," being an advertisement from the Louisville "Post" of April 26, 1896.

17. Respondents' exhibit No. 7, being a bill from Clinton E. Worden & Co. to Lucius Little.

18. Respondents' exhibit No. 8, being original sketch for a label.

19. Respondents' exhibit No. 9, being a loose label of the Yetiva Drugstore.

20. Respondents' exhibit No. 17, being an advertisement of the California Fruit Syrup Company on wrappers for bottles.

21. Respondents' exhibit No. 11, being order from Lucius Little to Clinton E. Worden & Co.

22. Respondents' exhibit No. 10, being small, loose labels of the Yetiva Drugstore.

You are further notified that upon the hearing of this appeal, the appellants will not dispute the manufacture and sale by Clinton E. Worden & Co. to the other defendants of the medicinal preparation, to which are attached the labels held by the Court to be an infringement of the appellee's rights, nor will the appellants dispute or deny the sale of said article by the other appellants to the public, for which reason appellants deem the above specified portions of the record to be immaterial to any issue in the case.

Dated at San Francisco, this thirtieth day of December, 1899.

JOHN H. MILLER,
Counsel for appellants.

In the United States Circuit Court of Appeals for the Ninth Circuit.

CLINTON E. WORDEN & CO.,
Appellants,

vs.

CALIFORNIA FIG SYRUP CO.,
Appellee.

Specification of Errors.

Now, comes the appellants in this case, and make and file with the clerk of the Court, the following as a statement of the errors on which said appellants intend to rely upon this appeal, to wit:

1. Error of the lower Court in granting and continuing the injunction, so far as it relates to the words "Syrup of Figs" and "Fig Syrup," to be used as a liquid laxative medicinal compound.

2. Error of the lower Court in granting and continuing the injunction, so far as it relates to the making, using, and selling of any liquid laxative medicine, marked with the name "Syrup of Figs" or "Fig Syrup."

3. Error of the lower Court in holding that the complainant was entitled to a trademark in the name of "Syrup of Figs" or Fig Syrup," as applied to a liquid laxative medical compound.

4. Error of the lower Court in holding that the use of the name "Syrup of Figs" or "Fig Syrup" by the respond-

ent upon respondents' liquid laxative medical compound was unfair competition by respondent with complainant's business.

5. Error of the lower Court in not holding that the name "Syrup of Figs or "Fig Syrup" is descriptive, and, if not descriptive, is deceptively used by complainants with intent and purpose of deceiving the public, and that the public was so deceived.

6. Error of the lower Court in not holding that the packages and advertisement of complainant represent that the complainant's preparation is a laxative fruit syrup, made from the juice of the California figs.

7. Error of the lower Court in not holding that the ordinary purchaser believes, when purchasing complainant's article, that he is purchasing a laxative preparation of which the essential ingredient is the California fig.

8. Error of the lower Court in not holding that the ordinary purchaser would be deceived to his harm by the statements on complainant's advertisements and packages.

9. Error of the lower Court in not holding that there were material misrepresentations in the name of complainant's preparation and in complainant's labels, bottles and packages and advertising matter.

10. Error of the lower Court in holding that the name "Syrup of Figs" or "Fig Syrup" is a name known to the drug trade, to the medical profession and to the public, as meaning only the preparation of complainant.

11. Error of the lower Court in holding that the respondents had been guilty of fraud and deceit in giving

the name "Syrup of Figs" or "Fig Syrup" to its preparation.

12. Error of the lower Court in holding that the complainants invented the name "Syrup of Figs" or "Fig Syrup."

13. Error of the lower Court in holding that the equities in this case were in favor of complainant and against respondent.

14. Error of the lower Court in holding that the testimony shows that the respondents had, and could have, no other object in adopting for its preparation the name "Syrup of Figs" or "Fig Syrup," than to trade upon the popularity of complainant's preparation to defraud complainant of the fruits of complainant's skill, labor and expenditures in establishing a reputation for complainant's preparation, and to pass off respondent's preparation as that of complainant's, and to trade on complainant's advertising, and the good will of complainant's business by unfair competition, and that nothing appears from which the Court can find that the complainant had been guilty of moral wrong such as to deprive it of the protection of a Court of equity.

15. Error of the lower Court, in holding that the respondents had been guilty of unfair competition in trade.

16. Error of the lower Court, in awarding an injunction against further use of the name "Syrup of Figs" or "Fig Syrup."

17. Error of the lower Court in awarding an injunction against unfair competition in trade by respondents.

18. Error of the lower Court in rendering a decree for

an accounting of damages in favor of complainant and against respondents.

19. Error of the lower Court in awarding an accounting of profits, realized by respondents in favor of complainant and against respondents.

20. Error of the lower Court in not dismissing the bill of complaint, and entering a final decree in favor of respondents for their costs.

The above constitutes a statement of the errors on which the appellants intend to rely upon this appeal.

Dated at San Francisco, this thirtieth day of December, 1899.

JOHN H. MILLER,
Counsel for appellants.

Service of the within notice and specifications of error, admitted this thirtieth day of December, A. D. 1899.

WARREN OLNEY,
Counsel for appellee.

[Endorsed]: No. 564. United States Circuit Court of Appeals, Ninth Circuit. Clinton E. Worden & Co., appellants, vs. California Fig Syrup Co., appellee. Notice and specifications of error on appeal.

Filed January 2, 1900. F. D. Monckton, Clerk. John H. Miller, attorney at law, Mills building, San Francisco, Cal., for appellant.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

CLINTON E. WORDEN & CO.,
Appellants,

vs.

CALIFORNIA FIG SYRUP CO.,
Appellee.

Notice to Print Documents in Record.

To John H. Miller, counsel for appellants, and to the clerk of the above entitled Court:

You are hereby notified that the appellee consents to the omission from the printed record of those portions of the record, filed with the clerk and mentioned in the notice by appellants, served upon the counsel for the appellee on the thirtieth day of December, 1899, as follows:

Nos. 1, 2, 3, 17, 18, 19, 20, 21, and 22.

You are further notified that the appellee does not consent to the omission from the printed record of those parts of the record, now on file with the clerk and numbered in said notice as follows, to wit:

Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16, and the appellee does hereby insist upon all said record being printed, except those portions thereof to which express consent is given for the omission thereof.

Dated at San Francisco, this fourth day of January, 1900.

OLNEY & OLNEY,
Solicitors for appellee.
WARREN OLNEY,
Of counsel for appellee.

Due service of the within, this fourth day of January, A. D. 1900, is hereby admitted.

J. H. MILLER,
Attorney for appellant.

[Endorsed]: No. 564. In the United States Circuit Court of Appeals, for the Ninth Circuit, State of California. Clinton E. Worden & Co., appellant, vs. California Fig Syrup Co., appellee. Notice to print documents in record.

Filed January 6, 1900. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk. Olney & Olney, solicitors for appellee, 101 Sansome street, San Francisco, Cal.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

CALIFORNIA FIG SYRUP COMPANY (a Corporation),
Complainant.

vs.

CLINTON E. WORDEN & CO. (a Corporation), J. A. BRIGHT, T. F. BACON, E. LITTLE, C. J. SCHMELZ, and LUCIUS LITTLE,
Defendants.

Bill of Complaint.

To the Honorable, The Judges of the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California:

Now, comes the California Fig Syrup Company, a corporation, duly created and existing under and by virtue of the laws of the State of Nevada, and brings this bill of complaint against the Clinton E. Worden & Co., a corporation, created and existing under the laws of the State of California, a citizen of the State of California, and having its chief office and place of business in the city and county of San Francisco, State of California; and against J. A. Bright, T. F. Bacon, E. Little, C. J. Schmelz and Lucius Little, each and all of whom are citizens of the

State of California, residing and doing business within the Northern District of California; and thereupon your orator, the California Fig Syrup Company, humbly complaining, shows unto your Honors:

That your orator, the California Fig Syrup Company, is a citizen of the State of Nevada, and has its chief office and place of business in the city of Reno, county of Washoe, State of Nevada, and has offices at San Francisco, California; Louisville, Kentucky; New York, N. Y.; in Montreal, Dominion of Canada, and in London, England.

That the defendant, Clinton E. Worden & Co., is a corporation, organized under the laws of the State of California, and is a citizen of the State of California, having its office and principal place of business in the city and county of San Francisco, State of California, within the Northern District of California.

That J. A. Bright, T. F. Bacon, E. Little, C. J. Schmelz, and Lucius Little are each and all citizens of the State of California, residing and doing business in the city and county of San Francisco, State of California, and within the Northern District of said State. That the defendants, Lucius Little and E. Little are, as your orator is informed and believes, husband and wife.

Your orator further shows unto your Honors that heretofore, to wit, in the year 1879, one Richard E. Queen invented a certain medical preparation or remedy for constipation, and to act upon the kidneys, liver, stomach and bowels, which medical compound is a combination in solution of plants, known to be beneficial to the human system, forming an agreeable and effective laxative to

cure habitual constipation and many ills, depending upon a weak and inactive condition of the liver, kidney, stomach and bowels, and that this preparation has found favor with physicians throughout the country and with the public at large, and is, and for many years last past has been sold in large quantities throughout the United States, Canada, England, and other countries, and throughout the State of California.

That shortly subsequent to the aforesaid invention your orator was incorporated, and thereupon said Richard E. Queen sold, transferred, and assigned all his right, title and interest in and to the said medical compound, and in and to the trade name, trademarks and good will of said compound to your orator.

That ever since said incorporation, continuously up to the present time, your orator has been and now is engaged in the manufacture and sale of said medical preparation or remedy.

Your orator further states that this laxative medical compound, or preparation, made and put up as aforesaid by your orator, has always been marked, named and called by your orator "Syrup of Figs," being advertised under that name by your orator, the name "Syrup of Figs," being printed or otherwise marked upon every bottle of this preparation made and sold by your orator, this name being also printed upon the boxes, packages or wrappers in which the bottles of this preparation are packed for shipment and sale; that it has been the practice of your orator to put the bottles containing this preparation in oblong pasteboard boxes or cartons, so that they will reach the consumer in that form; that in

all instances, not only the bottle which contains this preparation, but the box or carton which contains the bottle of this preparation, is marked with the words "Syrup of Figs," and also contains printed matter stating that this preparation is a medical laxative preparation, and also giving a general idea of its uses and purposes.

Your orator further states that the box or carton filed herewith, and marked "Exhibit A," truly represents the box or carton, which your orator uses, as a case or wrapper for its said laxative preparation; and that it is in such a box or carton that your orator's said preparation is exposed for sale to the consumer. Your orator further states, that the bottle in said carton "Exhibit A," which bottle is marked "Exhibit B," is a bottle of your orator's said laxative preparation, as marked and put up for sale by your orator, and the same is, and for many years last past has been, marked and put up for sale by your orator.

Your orator further states that it, and its said predecessor in interest, were the first to prepare a liquid laxative preparation or medicine, and marked or designated the said "Syrup of Figs," or "Fig Syrup."

Your orator further states that it, and its said predecessor in interest, were the first to pack and dress, or mark a liquid laxative preparation or medicine in the manner illustrated by said Exhibits "A" and "B"; that is to say, in an oblong, rectangular box or carton, with statements of the virtues of this preparation printed in different languages upon the back and sides of the carton, and having on the front of the carton, and on the border within which, at the top, is a representation of a branch

of a fig-tree, bearing fruit and leaves, surrounded by the words "Fig Syrup Company," or "California Fig Syrup Company," and below which appear in larger letters the words "Syrup of Figs," and below these last-named words appears a brief statement of the virtues of this preparation, together with the words "Manufactured only by the California Fig Syrup Company."

Your orator further states that it, and its predecessor in interest, were the first to put up a liquid laxative preparation in an oblong rectangular glass bottle, having on it a label with the words "Syrup of Figs," and directions for use; all as shown by Exhibit "B," said bottle being put in a carton or box like Exhibit "A."

Your orator further shows unto your Honors that it and its predecessors in interest was the first person, firm or corporation, engaged in the manufactue of a liquid laxative preparation, to adopt the business name of California Fig Syrup Company, or Fig Syrup Company, or a business name of which the words "Fig Syrup" were a part; and that in consequence, and as it was the first to manufacture a liquid laxative medicine and name it "Fig Syrup," or "Syrup of Figs," the complainant corporation is indifferently known by the trade and public as the "California Fig Syrup Company," "Fig Syrup Company," and "Syrup of Figs Company," to such an extent that business letters to your orator, ordering its said preparation, or on any business of said company, are frequently addressed to it under any one of said names.

Your orator further states that it has spent large sums of money, to wit, more than one million dollars ($1,000,000) in advertising said preparation, always under the

name of "Syrup of Figs," or "Fig Syrup," throughout the United States and other countries, thus making the same and its merits known to the public to such an extent that it has become a household word; that this preparation in consequence has become known as a liquid laxative medicine, so as to be distinguished from all other medicines of the same general character, under the name of "Syrup of Figs," and that its merits and popularity are so well established that many millions of bottles of your orator's preparations have been sold, always under the name of "Syrup of Figs" or "Fig Syrup," and that in the last twelve months more than two millions (2,000,000) bottles of your orator's said preparations have been sold; and your orator further states that the good name of said preparations is gaining in popularity and in the confidence of the public to such an extent that the demand for the same is increasing each day; and that now, and for years past, this preparation of your orator's manufacture, "Syrup of Figs," or "Fig Syrup," has been one of the principal articles of sale, and a part of the stock of almost every druggist in the United States.

Your orator further states that among other methods of advertising, for years past it has caused to be inserted in the various newspapers throughout the United States and other countries, and in the leading magazines and periodicals in the United States, and other countries, and particularly in the newspapers in California, and in the cities of San Francisco and Oakland, California, advertisements of this preparation, illustrated by Exhibit "C," and Exhibit "C[1]," and Exhibit "C[2]," filed herewith.

Your orator further states that by virtue of the premises, it has acquired the exclusive right to the name "Syrup of Figs," or "Fig Syrup," as it is indifferently called by the public, or any colorable imitation of the same, as applied to a liquid laxative medical preparation, irrespective of the form of bottle or package in which it may be sold to the public.

That by virtue of the premises your orator has acquired the exclusive right to the manner and form of packing the same for sale, in connection with the words "Syrup of Figs" or "Fig Syrup," as illustrated by Exhibits "A" and "B," filed herewith,or any colorable imitation of the same; that by virtue of the premises it has acquired the exclusive right to the words "Syrup of Figs," or "Fig Syrup," or any colorable imitation of the same, as a part of the business name of a concern making a liquid laxative medical compound.

Your orator further shows unto your Honors that, on account of the care, skill and fidelity with which it has and does prepare this, its said laxative preparation or medicine, and by reason of the steady and increasing demand for the same, and the large sums of money spent in advertising and in introducing the same, and making it known to the public, your orator's good will in the manufacture of this preparation, marked and addressed as aforesaid, is of great value, to wit, of the value of one million dollars ($1,000,000.00).

Your orator further shows unto your Honors that the defendant, Clinton E. Worden & Co., well knowing all the premises, and that your said orator's said preparation has attained a great popularity and a large sale on account

of its merits as a liquid laxative compound for the human system, and desiring and intending to perpetrate a fraud upon your orator's aforesaid rights, and to trade to its own profit and advantage upon the reputation, created as aforesaid by your orator's preparation, and desiring to impose a worthless production upon the public, as and for your orator's said preparation, has prepared, as your orator is informed and believes, a preparation, and put it up in packages resembling in form your orator's said preparation, has called said preparation "Syrup of Figs," and is palming off the same, or causing the same to be palmed off upon the public as and for your orator's said preparation, and upon the valuable reputation which your orator has created for its said medical laxative preparation.

And in that behalf your orator further alleges upon its information and belief that said defendant, Clinton E. Worden & Co., has caused to be made and put up and sold, and offered for sale, a liquid laxative medical compound, resembling your orator's said preparation, under the name "Syrup of Figs" and "Fig Syrup," and marking the boxes, or packages, containing the same with the name "Fig Syrup" or "Syrup of Figs"; and it has caused to be made and put up said preparation, under said name, in bottles and packages or cartons, so closely in imitation of your orator's bottles and packages (Exhibits "A" and "B"), as to be likely to deceive the ordinary purchaser in buying defendant's preparation for that of your orator, and so as to enable unscrupulous retail dealers to palm off said defendant's preparation on the consumer as and for your orator's said preparation.

And in that behalf your orator further alleges that said defendant, Clinton E. Worden & Co., as your orator is informed and believes, has put up and offered for sale and sells a compound, claiming to be a liquid laxative medical preparation, and encloses it in bottles and packages very similar in size to the bottles and packages prepared and sold by your orator, and has marked the same with the words "Syrup of Figs," and has stated and declared on the outside carton, or paper box, containing said bottles, words importing the meaning and statement that the same is prepared and sold by a "Fig Syrup Company." On some bottles the statement is made by the said defendant to the effect that said preparation is made by "The San Diego Fig Syrup Company, San Francisco, Cal." On other bottles the statement is made to the effect that said preparation or compound is made by the "Fig Syrup Company, San Francisco, Cal." On other bottles, the statement is made that said preparation is manufactured by the "San Francisco Fig Syrup Company, San Francisco, Cal." On other bottles, the statement is made to the effect that the compound is prepared by the "New York Fig Syrup Company, New York City, N. Y." And again, on other bottles, the statement is made that it is "Prepared by Yetiva Drug Company, Louisville, Kentucky." And, again, on other bottles, said defendant makes the statement that the preparation is manufactured by the "Laxative Fig Syrup Company, New York City, N. Y."

That in truth and in fact, as your orator is informed and believes, there is no corporation, copartnership, or firm, except your orator, doing business under the name

of "Fig Syrup Co.," and said statements made upon said bottles by the said defendant are intended to deceive the public, and induce them to believe that the compound prepared by said defendant is prepared by your orator.

That, as your orator is informed and believes, customers are deceived by said statements, and are induced to purchase said compound prepared by the said defendant, Clinton E. Worden & Co., in the belief that they are purchasing the liquid laxative medicine, prepared and sold by your orator.

That the other defendants herein named, except Clinton E. Worden & Co., are druggists, doing business in the city and county of San Francisco, State of California, and, knowing that the compound put up and sold by the defendant, Clinton E. Worden & Co., is not manufactured by your orator, and is not put up or sold by your orator, and with the intent and purpose of deceiving their customers, are selling to customers the liquid laxative compound prepared by the defendant, Clinton E. Worden & Co., as and for the medical preparation made and sold by your orator.

That your orator's said preparation has become so well known, that when a person desires to purchase the same, the ordinary method is to go to a drug store and call for "Syrup of Figs," or "Fig Syrup." That the defendants, other than the said Clinton E. Worden & Co., are in the habit, as your orator is informed and believes, when a customer calls for "Fig Syrup," or "Syrup of Figs," to offer for sale to such customer a bottle or package of the spurious compound made by Clinton E. Worden & Co., as aforesaid, and recommend the same to such purchaser,

and, unless the purchaser is fully acquainted with the names and style of packages put up by your orator, such purchaser is liable to be deceived, and frequently has been deceived and induced to buy said compound prepared by the said Clinton E. Worden & Co, and retailed to customers by the other defendants, as hereinabove set out.

Filed herewith are bottles and packages of the preparation made by the defendant, Clinton E. Worden & Co., and sold to retail buyers by the other defendants, as hereinabove set out. Said bottles and packages are marked Exhibits "D," "E," "F," "G," "H," and "I."

That said defendant, Clinton E. Worden & Co., have put up their bottles and packages in such a close imitation of the packages prepared by your orator, as to cause the retail purchaser of "Syrup of Figs" or "Fig Syrup," who calls for the article of your orator's manufacture under said name, to at once conclude when he is handed a bottle of defendant's preparation, marked as aforesaid, that he has the original article of your orator's manufacture, which he has seen advertised.

Your orator further states that the intent and the actual effect of the aforesaid action of the defendant, Clinton E. Worden & Co., and of the other defendants, is to perpetrate a fraud on your orator in its business in the manufacture of this liquid laxative preparation, and also upon the public, by causing a confusion in the trade between your orator's said laxative medicine, or preparation, and that of defendant's, and by causing said defendant's said preparation to be sold on the reputation of your orator's said laxative preparation, and by putting it in

the power of unscrupulous retail druggists to palm off upon the consumer the defendant's said preparation, as and for the preparation of your orator.

Your orator further states, upon its information and belief, that in order that said fraud may be the more effectually carried out as an inducement to the retail druggist to buy of the defendant, the Clinton E. Worden & Co., and make a greater profit thereby, the said defendant, Clinton E. Worden & Co. sells its preparation to the retail druggists at a much lower price than the price established by your orator for its said preparation, so that it is to the pecuniary interest of the dishonest retail dealer to buy said fraudulent preparation, and palm it off on the unsuspecting public as and for your orator's preparation.

Your orator states that, although the defendants, knowing the premises, they have deliberately and fraudulently conspired together, as your orator is informed and believes, to perpetrate the frauds upon your orator, hereinbefore set forth.

And your orator further states that it has been greatly injured in its business in the manufacture of this,its liquid laxative preparation "Syrup of Figs" or "Fig Syrup," and that your orator is unable to say, but it verily believes that it has suffered damage and injury by reason of the acts of the defendants aforesaid, to the extent of at least ten thousand dollars ($10,000.00); but your orator states that this is a continuing wrong, and one which it is impossible to exactly calculate, and one which, if permitted to continue, will work irreparable injury to your orator.

In consideration whereof, and inasmuch as your orator cannot have adequate redress at law and is without complete remedy, save by the aid and interposition of this Court as a Court of equity, your orator respectfully prays your Honors to grant a perpetual writ of injunction, issuing from this Court under the seal of this Court, enjoining the defendants, Clinton E. Worden & Co., a corporation, and the defendants, J. A. Bright, T. F. Bacon, Lucius Little, E. Little, and C. J. Schmelz, and each and all of them, their agents, servants, attorneys, solicitors and counselors, from manufacturing, selling, or offering for sale, directly or indirectly, any liquid laxative medical preparation, marked with the words "Syrup of Figs," or "Fig Syrup," or marked with any words which may be a colorable imitation of the name "Syrup of Figs" or "Fig Syrup," and from putting up, selling, or dealing in any liquid laxative medical preparation which shall have a tendency to deceive the public and induce buyers to purchase the defendant's preparation, believing the same to be the preparation of your orator.

That your Honor may also grant a perpetual writ of injunction under the seal of this honorable Court, against the said defendants above named, and each and all of them, their agents, attorneys, solicitors and counselors, from manufacturing, selling, or offering for sale any such preparation, dressed or packed in bottle or cartons so as to be colorable imitations of the liquid laxative preparation, "Syrup of Figs or "Fig Syrup," as put up in bottles or cartons by your orator, and from putting up for sale, or selling, or offering for sale any liquid laxative preparation with or without the name "Syrup of Figs" or "Fig

Syrup" in a bottle or carton in imitation of the manner in which your orator's said liquid laxative preparation is put up for sale, and that each and all of said defendants, their agents, servants, attorneys, solicitors and counselors, be perpetually enjoined from using the words "Fig Syrup Company" as a business name, or from using the words "Fig Syrup" or "Syrup of Figs," as part of the business name, in connection with the manufacture and sale of a liquid laxative preparation.

Your orator also prays that your Honors may grant a preliminary injunction, issuing under the seal of this honorable Court, and pending the hearing of the application for perpetual injunction, and on the filing of this bill of complaint, a temporary restraining order under the seal of this honorable Court, enjoining the said defendants, and each of them and all of them, their agents, servants, attorneys, solicitors, counselors and workmen, from making, selling, or offering for sale, directly or indirectly, any liquid laxative preparation under the name "Syrup of Figs" or "Fig Syrup," or under any name in colorable imitation of the name "Syrup of Figs" or "Fig Syrup," and from making, selling, or offering for sale, directly or indirectly, any medical liquid laxative preparation put up in bottles, boxes, or packages, similar in form and arrangement to the bottles or packages used by your orator in the manufacture and sale of its said liquid laxative preparation, or so closely resembling the bottles or packages used by your orator, as to be calculated to deceive the public; and from using the name "Fig Syrup Company," or from using a name whereof the words "Fig Syrup" or "Syrup of Figs Company" form a

part, as a business name in connection with the manufacture of a liquid laxative preparation.

Your orator further prays that the defendants, and each and all of them, may be made to account before a Master of this Court for all profits, gains, or advantage which defendants, or any of them, may have derived by reason of the infringement of the good will of your orator's business in the manufacture and sale of said liquid laxative preparation, and that the defendants above named, and each and all of them, may be ordered to pay over to your orator all the gains and profits which they, or any one of them, may have made by reason of the infringement of the good will of your orator's business in the manufacture and sale of said liquid laxative preparation as herein complained; and that the defendants above named, and each and all of them, may be made to account to your orator for all damages, caused to your orator by reason of the aforesaid unlawful acts of said defendants, or any or all of them.

And your orator prays for such other and further relief in the premises as to your Honors may seem meet and may be agreeable to equity and good conscience.

May it please your Honors to grant unto your orator writs of subpoena, issuing out of and under the seal of this Court, to be directed to the said Clinton E. Worden & Co., J. A. Bright, T. F. Bacon, E. Little, Lucius Little and C. J. Schmelz, respectively, commanding said defendants respectively, on a certain day and under a certain penalty in said writs to be inserted, to be and appear before your Honors in this Court, then and there to answer the premises and to abide by and perform such order and

decree therein as to your Honors may seem meet, and shall be agreeable to equity and good conscience; and your orator prays that it may have costs and charges in this behalf paid by the defendants.

OLNEY & OLNEY,
Solicitors for said orator.

[Duly Verified.]

[Endorsed]: Filed June 1, 1897. W. J. Costigan, Clerk.

In the Circuit Court of the United States, for the Northern District of California.

CALIFORNIA FIG SYRUP CO.,
Complainant.

vs.

CLINTON E. WORDEN & CO. et al.,
Defendants.

The Joint and Several Answer of all the Defendants to the Complainant's Bill of Complaint Against Them Exhibited.

These defendants, saving and reserving to themselves, now and at all times hereinafter mentioned, all and all manner of benefits and advantage of exception, which can or may be had or taken to the said complainant's said bill of complaint, for answer thereto, or to so much thereof as these defendants are advised, is any wise material or necessary for them to make answer unto, answering say:

That they do not know, and that they are not informed except by said bill of complaint, whether the California Fig Syrup Company is a citizen of the State of Nevada, or has its chief office and place of business in the city of Reno, county of Washoe, State of Nevada, and, therefore, they leave the complainant to make such proof thereof as it may deem necessary and proper.

Admit that the defendant, Clinton E. Worden & Co., is a corporation, organized under the laws of the State of California, having its office and principal place of business in the city and county of San Francisco, State of California.

Admit that the other defendants are citizens of the State of California, residing in the city and county of San Francisco, aforesaid.

And these defendants, further answering, say that they are not informed, save by the said bill of complaint, whether in the year 1879, or at any other time, Richard E. Queen, mentioned in the bill of complaint, invented the certain medical preparation or remedy referred to in the bill of complaint, or that the same was or is a combination in solution of plants, known to be beneficial to the human system, or that the same is a cure for any human ills, or that the same has found favor with physicians or the public, and, therefore, and on that ground, these defendants leave the complainant to make such proofs in that regard as they may deem proper.

And these defendants are not informed save by said bill of complaint, whether the said Queen sold, transferred, and assigned his right, title and interest in and to said medical compound, and in and to the trade name,

trademark and good will of said compound to complainant, and, therefore, and on that ground, these defendants leave the complainant to make such proof in that regard as they may deem proper.

And, further answering, these defendants admit that the said medical compound has always been marked, named and called by the complainant "Syrup of Figs," and advertised under that name, and that the said name has been printed or otherwise marked upon every bottle of said preparation, made and sold by complainant, and also printed upon the boxes, packages or wrappers in which the bottles are packed, and that it has been the practice of complainant to put the bottles containing said preparation in oblong pasteboard boxes or cartons, and that in all instances not only the bottles which contained the preparation, but the boxes or cartons which contained the bottles were marked with the words "Syrup of Figs," and also contained printed matter, stating that the preparation was a medical laxative preparation, and giving a general idea of its use and purposes.

Admits that the box or carton filed in this case and marked Exhibit "A" represents the box or carton which the complainant was using at the commencement of this suit as a case or wrapper for its said laxative preparation, and that in such a box or carton complainant's preparation was ordinarily exposed for sale to the consumer, and that the bottle in said carton, which bottle was marked Exhibit "B," is a bottle of complainant's said preparation as marked and put up for sale by complainant, but in this behalf these defendants aver that the said box or carton marked Exhibit "A," in the form

in which it there appears, has been used by the complainant only for a comparatively short period of time, and that, when the complainant first began to prepare and sell said compound, and for many years continuously thereafter, said complainant sold said preparation in boxes, cartons, wrappers, and labels, different from Exhibit "A" in this: that they contained upon their face in prominent type many false and fraudulent statements, concerning said preparation, which tended to deceive and were made for the purpose of deceiving the public at large, and the users of said compound, and, amongst other things, was the statement that said preparation was the "California Liquid Fruit Remedy," and that the same "presents in the most elegant form the laxative and nutritious juice of the figs of California," all of which statements were false, fraudulent and deceptive, and were made for the purpose of deceiving the public and the users of said medical compound; that by reason of said false and fraudulent statements upon said labels, complainant built up a large business in the sale of said compound, and was enabled to sell, and did sell, vast quantities of the same throughout the world on the strength of said representations, whereby the said preparation became known throughout the world as the "California Liquid Fruit Remedy," and was supposed by the public at large and consumers thereof to be a California liquid fruit remedy and to be composed largely of the nutritious juices of the California figs, and it is only by virtue of such representations that the said medicine became known and acquired a reputation throughout the world; that after the said medicine had so become known and

acquired its said reputation throughout the world, and complainants had sold vast quantities thereof and realized vasts profits from such sale, all of which had been induced, caused and brought about by reason of said fraudulent, false and deceptive statements and representations contained on said boxes, wrappers and labels, but not until within a short time prior to the commencement of this suit the complainant removed from its boxes, labels and wrappers the statement that the preparation was the California Liquid Fruit Remedy, and that it "Presents in the most elegant form the laxative and nutritious juice of the figs of California," and in lieu thereof adopted and used the label or wrapper, Exhibit "A," filed with the bill of complaint herein, and printed in small type thereon the words "The juice of figs in the combination is to promote the pleasant taste"; but in this behalf these defendants aver that said last named statement is not only false, fraudulent and deceptive, but was placed upon said labels for such purpose; that the juice of figs in said combination was not and is not to promote the pleasant taste; that there is practically no juice of the figs whatever in said compound; these defendants are advised and informed that there is an infinitesimal proportion of figs in said preparation, put there solely for the purpose of enabling the complainant to say that the preparation contains figs, and for no other purpose; that the presence of said infinitesimal quantity of figs in said preparation is not perceptible and has no affect on said combination and does not add anything to its medical or other qualities, does not affect the taste of the compound in any

way whatever, does not promote a pleasant taste therein, is not perceptible to the taste.

Wherefore, these defendants aver that the said label still contains upon its face a false, fraudulent and deceptive statement of facts which materially induces the users of said medicine to purchase the same, and by reason of such fact complainant is disentitled to any relief in equity.

And, further answering, these defendants say that they do not know and they are not informed, save by said bill of complaint, whether complainant and its predecessors in interest were the first to prepare a liquid laxative preparation or medicine and marked or designated the same "Syrup of Figs" and "Fig Syrup," and therefore these defendants leave complainant to make such proofs in that regard as it may deem proper.

And, further answering, these defendants say that they do not know, and they are not informed, save by said bill of complaint, whether the complainant and its said predecessor in interest were the first to pack and dress or mark a liquid laxative preparation or medicine in the manner illustrated by said Exhibits "A" and "B"; that is to say, in an oblong rectangular box or carton with statements of the virtues of this preparation printed in different languages upon the back and sides of the carton, and having on the front of the carton and on the border within which, at the top, is a representation of a branch of a fig-tree bearing fruit and leaves, surrounded by the words "Fig Syrup Company" or "California Fig Syrup Company," and below which appear in larger letters the words "Syrup of Figs," and below these last named words appears a brief statement of the virtues of this prepara-

tion, together with the words "Manufactured only by the California Fig Syrup Company," and therefore, and on that ground these defendants leave the complainant to make such proof in that regard as it may deem proper.

And, further answering, these defendants say that they are not informed, save by said bill of complaint, whether the complainant and its predecessor in interest was the first to put up a liquid laxative preparation in oblong rectangular glass bottles having on them labels with the words "Syrup of Figs" and directions for use, all as shown by Exhibit "B," said bottles being put up in cartons or boxes like Exhibit "A," and therefore these defendants leave the complainant to make such proof in that regard as it may deem proper.

And, further answering, these defendants say that they do not know and they are not informed, save by said bill of complaint, whether the complainant and its predecessor in interest was the first person, firm or corporation to adopt the business name of "California Fig Syrup Company" or "Fig Syrup Company," or a business name of which the words "Fig Syrup Company" were a part, or whether the complainant is indifferently known by the trade and public as the "California Fig Syrup Company," the "Fig Syrup Company" and "Syrup of Figs Company" to such an extent that business letters to complainant ordering its said preparation or on any business said company were frequently addressed to it under any one of said names, and therefore these defendants leave complainant to make such proof in those matters as it may deem proper.

And, further answering, these defendants say that they do not know and are not informed, save by said bill of complaint whether the complainant has spent large sums of money or more than one million dollars in advertising its said preparation under the name "Syrup of Figs" or "Fig Syrup" throughout the United States and other countries, or has made the same and its merits known to the public to such an extent that it has become a household word, or that said preparation in consequence has become known as a liquid laxative medicine so as to be distinguished from all other medicines of the same general character under the name "Syrup of Figs," or that its merits and popularity have become so well established that many millions of bottles have been sold under the name of "Syrup of Figs," or "Fig Syrup," or that in the last twelve months before the filing of the bill of complaint more than two million bottles thereof had been sold, or that the good name of said preparation was gaining in popularity and in the confidence of the public to such an extent that the demand for the same is increasing each day, or that at the commencement of this suit or for years past this preparation of complainant has been one of the principal articles of sale and a part of the stock of almost every druggist in the United States, and therefore these defendants leave the complainant to make such proofs in those matters as it may deem proper.

Admit that amongst other ways of advertising the complainant has used the advertisement illustrated by Exhibit "C," Exhibit "C1" and Exhibit "C2," filed herein with the bill of complaint, but in that behalf aver that until within comparatively a short time before the filing of

the bill of complaint all of such advertisements then contained statements to the effect that the said preparation of the complainant was the "California Liquid Fruit Remedy" and contained the juice of the figs or was made from figs, whereas such said statements were false, fraudulent and deceptive, and complainant removed said statement from its said advertisement and advertised in the form of said exhibits merely for the purpose of laying a foundation on which to bring this suit, knowing full well that if they brought a suit while its advertisement contained such false, fraudulent and deceptive statements they could obtain no relief in this Court nor in any other Court of equity.

And, further answering, these defendants deny that the complainant has acquired the exclusive right to the name "Syrup of Figs" or the name "Fig Syrup" or to any colorable imitation of the same as applied to a liquid laxative medical preparation, irrespective of the form of bottle or package in which it may be sold to the public.

Deny that complainant has acquired the exclusive right to the words "Syrup of Figs" or "Fig Syrup" or any colorable imitation of the same as a part of the business name of a concern making a liquid laxative medical compound.

And, further answering, these defendants say that they do not know, and they are not informed, save by said bill of complaint, whether the complainant's good will in the manufacture of said preparation is of the value of one million dollars or any other sum, and therefore they leave the complainant to make such proofs in that regard as it may deem proper.

And these defendants deny that the defendant, Clinton

E. Worden & Co., desiring or intending to perpetrate a fraud on complainant's rights or to trade to its profit and advantage upon the reputation created by complainant's preparation, or desiring to impose a worthless production upon the public as and for complainant's preparation, or otherwise or at all has prepared and put up in packages resembling in form the complainant's preparation, or in palming off the same or causing the same to be palmed off upon the public as and for complainant's preparation or upon the valuable reputation which the complainant claims to have created for its said medical laxative preparation.

These defendants admit that Clinton E. Worden & Co. have prepared, put up, and sold a liquid laxative medicine under the name "Syrup of Figs," but deny that the same has been put up and sold in bottles, packages or cartons so closely in imitation of complainant's bottles and packages, Exhibits "A" and "B," as to be likely to deceive the ordinary purchaser in buying defendant's preparation for that of complainant, or to enable unscrupulous retail dealers to palm off defendant's preparation as the complainant's preparation.

Admit that the defendant, Clinton E. Worden & Co., has put up for sale and sold a compound claiming to be a liquid laxative medical preparation and enclosed it in bottles and packages very similar in size to those of complainant, and has marked the same with the words "Syrup of Figs" and has stated and declared on the outside carton or paper box containing said bottles, words importing that the same is prepared by a Fig Syrup Company; that on some bottles the words "The San Diego Fig

Syrup Company, San Francisco, Cal.," on others the words "Fig Syrup Company, San Francisco, Cal., on others the words "New York Fig Syrup Company, New York city, N. Y.," on others the words "Prepared by Yetiva Drug Company, Louisville, Kentucky," and on others the words "Laxative Fig Syrup Company, New York City, N. Y.," have appeared, but in this behalf and in explanation thereof these defendants aver that the defendant, Clinton E. Worden & Co., is a wholesale manufacturing druggist, engaged in manufacturing medical compounds for other druggists and for retail druggists; that it has manufactured the medical compound called "Syrup of Figs" for other druggists and at their orders; that the name hereinabove referred to is placed upon the labels enclosing said bottles at the request and the order of the retail druggist who orders the same and not at the instigation of said Clinton E. Worden & Co., that the said druggists ordered the medicine from Clinton E. Worden & Co., and ordered and directed Clinton E. Worden & Co. to place said words upon said labels, and thereupon Clinton E. Worden & Co. manufactured said medicine and placed said words upon said label and delivered the same to the retail druggists ordering the same; that the said Clinton E. Worden & Co. does not know whether said names are fictitious or otherwise and whether or not there is no corporation, copartnership or firm excepting that of complainant doing business under the name of "Fig Syrup Company," and whether said statements upon said bottles were intended to deceive the public and induce them to believe that the compound prepared by Clinton E.

Worden & Co. is prepared by complainant these defendants have no knowledge, information or belief on the subject and therefore leave the complainant to make such proof in that behalf as it may deem proper.

And, further answering, these defendants say that they do not know, and they are not informed, save by said bill of complaint, whether customers are deceived by said statements or are induced to purchase said compound prepared by Clinton E. Worden & Co. in the belief that they are purchasing the liquid laxative medicine prepared and sold by complainant, and therefore they leave complainant to make such proof in that regard as it may deem proper.

Admit that the other defendants herein, except Clinton E. Worden & Co., are druggists doing business in the city and county of San Francisco, State of California, and aver that they have no connection with one another or with Clinton E. Worden & Co., but each of them has a separate and independent business of his own in which none of the others are interested, and they have separately and individually purchased from Clinton E. Worden & Co. the liquid laxative medicine made by Clinton E. Worden & Co., called "Syrup of Figs," and have sold the same, but deny that it was with the intent and purpose of deceiving their customers, or that they ever sold the said preparation as and for the medical preparation made and sold by complainant.

Further answering, these defendants say that they do not know and are not informed, save by said bill of complaint, whether the complainant's preparation has become so well known that when a person desires to purchase the

same the ordinary method is to go to the drugstore and call for "Syrup of Figs" or "Fig Syrup," and therefore and on that ground they leave the complainant to make such proof thereof as it may deem proper.

Further answering, these defendants deny that Clinton E. Worden & Co. have put up their bottles and packages in such close imitation of packages put up by complainant as to cause the retail purchasers of "Syrup of Figs" or "Fig Syrup," who call for the article of complainant's manufacture under said name, to at once conclude when he is handed a bottle of defendant's preparation, marked as aforesaid, that he has the article of complainant's manufacture which he has seen advertised.

Deny that the intent and the actual effect of any actions of the defendant is to perpetuate a fraud on complainant in its business in the manufacture of said liquid laxative preparation or upon the public by causing a confusion in the trade between complainant's medicine and that of defendant, or by causing defendant's preparation to be sold on the reputation of complainant's, or by putting it in the power of unscrupulous retail druggists to palm off upon the consumer the defendant's preparation as and for that of complainant.

These defendants deny that in order that any fraud may be more effectually carried out or for any improper motive, said Clinton E. Worden & Co. sells its preparation to retail druggists at a much lower price than that established by complainant for its preparation.

Defendants deny that they have deliberately or fraudulently or otherwise or at all conspired together to per-

perpetuate upon complainant the fraud charged in the complaint, or any fraud.

Deny that the complainant has been greatly or at all injured in its business in the manufacture of its medicine known as "Syrup of Figs," or that it has suffered injury or damage by reason of the acts of defendants to the extent of at least ten thousand dollars, or that it is a continuing wrong or one which, if permitted to continue, will work irreparable injury.

And, for a separate and further defense, these defendants aver, upon their information and belief, that the preparation made and sold by complainant under the name of "Syrup of Figs" does not and never did contain any syrup of figs or any fig syrup; or any juice of figs or any part or portion or quantity of figs in any form; and that the name "Syrup of Figs" and "Fig Syrup" and the name of the company, "The California Fig Syrup Company," and the form and appearance of the labels and the pictures on the labels, and the statements on the labels adopted and used by complainant in connection with its liquid laxative medicine were all designed, adopted and used with the deliberate intent and purpose to deceive the public and the user of the medicine and to perpetrate a fraud upon them by inducing them to believe that the preparation contained figs in some form, and that by reason thereof the said medicine derived its laxative properties and also a pleasant and agreeable taste; that the complainant has been successful in perpetrating the said fraud upon the public and for years last past has perpetrated said fraud by wholesale and have induced the public generally throughout the world to believe the state-

ments aforesaid concerning the said medicine and its connection with figs, and thereby complainant has made and realized large profits, gains and advantages from the sale of said medicine, all of which was caused and which accrued and were made by reason of said false, fraudulent and deceptive statements; that as a matter of fact the said so called "Syrup of Figs," sold by complainant consists of the ordinary and well known laxative called senna as a basis, together with certain aromatic carminatives added for the purpose of giving it a pleasant and agreeable taste as a cure to the naturally griping effect of senna when taken alone; that in order to sell such a compound complainant made the false, fraudulent, and fictitious statements hereinabove charged against it and was enabled to sell the same solely by virtue of said false, fraudulent and fictitious statements, and said complainant has built up its business and its trade upon the strength of and by virtue of the said false, fraudulent and fictitious statements, for which reason complainant is not entitled to relief in a Court of equity.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by said bill charged; without this, that there is any other matter, cause or thing in the said bill of complaint contained (material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, canvassed, traversed and avoided or denied) is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable Court shall direct; and humbly pray to be hence

dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

PURCELL ROWE,
Solicitor for defendants.

JOHN H. MILLER,
Of counsel.

United States of America,
Northern District of California,
City and County of San Francisco. } ss.

W. W. Worden, being duly sworn, deposes and says that he is treasurer of Clinton E. Worden & Co., one of the defendants in the within entitled action; that he has read the above and foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

That this verification is made on behalf of all the defendants.

W. W. WORDEN,
Treas. of Clinton E. Worden & Co.

Subscribed and sworn to before me this thirteenth day of April, 1898.

[Seal] FRANK L. OWEN,
Notary public in and for the city and county of San Francisco, State of California.

[Endorsed]:

Service of the within answer admitted this fourteenth day of April, A. D. 1898.

OLNEY & OLNEY,
Solicitors for complainant.

Filed April 14, 1898. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

CALIFORNIA FIG SYRUP CO. (a Corporation),
Complainant,
vs.
CLINTON E. WORDEN & CO. (a Corporation), J. A. BRIGHT, T. F. BACON, E. LITTLE, C. J. SCHMELZ, and LUCIUS LITTLE,
Defendants.

Replication.

Now comes the complainant in the above entitled action and for replication to the answer of Clinton E. Worden & Co., a corporation, and to the answer of J. A. Bright, T. F. Bacon, E. Little, C. J. Schmelz and Lucius Little, alleges as follows:

This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insuffi-

ciencies of each of the said answers, for replication thereunto, and to each of said answers, saith that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto; and that each of the said answers of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove, as this honorable Court shall direct; and humbly prays, as in and by its said bill hath already prayed.

OLNEY & OLNEY,
Solicitors for complainant.

[Endorsed]:

Service of the within is hereby admitted this second day of May, 1898.

PURCELL ROWE,
Solicitor for defendants.

Filed May 2, 1898. Southard Hoffman, Clerk.

In the Circuit Court of the United States, for the Ninth Judicial Circuit, in and for the Northern District of California.

In EQUITY.

CALIFORNIA FIG SYRUP CO.,
Complainants,
vs.
CLINTON E. WORDEN & CO. et al.,
Respondents.
No. 12,378.

Testimony Before Examiner.

Be it remembered, that, on the eleventh day of October, A. D. 1898, and on the several days thereafter to which the examination was regularly adjourned, as hereinafter set forth, at my office, room 87, in the United States Appraisers' building, on the southeast corner of Jackson and Sansome streets, in the city and county of San Francisco, State of California, before me, E. H. Heacock, Examiner in Chancery, of the Circuit Court of the United States for the Ninth Circuit and Northern District of California, personally appeared the several witnesses whose names are hereinafter set forth, who were produced and examined on behalf of the respective parties to the above-entitled cause.

Warren Olney, Esq., appeared as counsel on behalf of complainant, and

John H. Miller, Esq., as counsel on behalf of respondents.

Following is a record of the proceedings:

(It is stipulated that the depositions of the several witnesses may be taken down stenographically by B. C. Brown, a skillful stenographer, and by him put into typewriting.)

Examination-in-Chief of

RICHARD E. QUEEN, a witness called on behalf of complainant; sworn.

(By Mr. OLNEY.)

Q. 1. What is your full name?

A. Richard E. Queen.

Q. 2. What is your age and place of residence?

A. My age is forty-five on my next birthday; my residence is 2212 Sacramento street, San Francisco.

Q. 3. What position, if any, do you occupy in connection with the complainants in this case?

A. I am the general manager of the California Fig Syrup Co., the complainant in this case.

Q. 4. How long have you been such general manager?

A. Since the fall of 1883.

Q. 5. What was your position prior to the year 1879?

A. I was in the drug business.

Q. 6. Where?

A. At Reno, Nevada, from the fall of 1876 to the year 1879.

Q. 7. Up to what time?

A. Up to the year 1883, the fall of 1883.

Q. 8. Did you receive an education as a druggist, a professional education? A. Yes, sir.

Q. 9. Where?

A. In Kentucky. I would explain in this connection that I had about three years' practical training in some of the leading drugstores in the State, and then I went to college for two or three terms, where I took special lessons in chemistry, from a professor in chemistry, and in the year 1874 I passed an examination before the State Board of Pharmacy at Louisville, Kentucky, which authorized me to practice pharmacy in that State.

Q. 10. When did you first commence to work as a practical druggist and pharmacist? A. As a clerk?

Q. 11. Yes, when you first commenced to work at the position? A. In 1869 or in 1870.

Q. 12. And you worked at that business in Louisville, Kentucky, up to what time?

A. I started at Owensboro, Kentucky, afterward I spent about a year at Henderson, Kentucky, and then went to Louisville in 1874 and took charge of a drugstore there as chief clerk and continued there until the fall of 1876.

Q. 13. Did you or not, during this time, give any attention to the compounding of preparations of food or medicine or both?

A. Yes, I paid special attention and devoted a good deal of my time to making original compounds and investigations in that line.

Q. 14. Now, coming down to Reno, Nevada. After you got in business there, did you pay any attention to the preparation of a compound to be used as a laxative? If so, state what you did.

A. After moving to Reno, Nevada, I was employed as manager of a drugstore there until the end of the year

1877, when I went into a drug business of my own, and during the year 1878, I made many experiments, with the idea of producing a pleasant, effective, liquid laxative, having observed that many people dislike to take pills, oils and other disagreeable medicines; and, after many experiments and study of laxatives in general, came to the conclusion that senna was the best general laxative known, but that the preparations then on the market were either weak in effect or griping in their nature; and I thought that if I could make a liquid preparation of senna which would be really pleasant to the taste and free from griping qualities, that it would answer the purpose. And at that time I also thought that certain other medicinal agents should be combined with the senna, and some of those medicinal agents were not very pleasant to the taste. And I thought of figs as a fruit that would afford me a considerable quantity of sugar and mucilaginous substance to counteract the unpleasant taste of the medicinal agents. And I used figs freely in my experiments for that purpose. As I progressed with my experiments I found or determined as a result of my experiments and studies that a uniformity and stability of product were of great importance, and that the fig substance was not conducive to those qualities, and that it had a strong tendency to ferment, and, therefore, that it would be better to use a small quantity. I also found that those medicinal agents which were unpleasant to the taste were better adapted to special cases than to general use, and concluded to omit them, and therefore did not need as large a quantity of fig substance as formerly. As finally prepared I had a new and original compound,

of which the fig syrup formed a very small but pleasant part, although not an essential part of the combination; that is, I might have used an equal quantity of honey or some other substance, instead of the fig substance, without changing the character and effect of the combination. While making my experiments I thought of what name I would give the preparation when completed. And as I was using figs I thought of the name "Syrup of Figs," which I then believed, and which subseqent investigation has confirmed, to be a new and original name, applied the first time to a laxative medicine. I consulted the textbooks and price lists—

Mr. OLNEY (to Mr. Miller).—There is no objection to the witness going on and answering my question without my asking other questions?

Mr. MILLER.—I have not interposed any objection yet.

Mr. OLNEY.—Very well, as long as there is no objection, go right ahead and tell your story.

The WITNESS (Continuing).—to see if the name had been used before. I could not find that it had ever been used. I desired to give a name which would be new and original, to distinguish my product from all other laxative medicines, and which would be pleasantly suggestive, and, after thinking over a number of names, I decided to use the name "Syrup of Figs." I knew that I was not using the name generically, because figs did not give character and effect to the combination. After having the preparation ready for sale I visited the physicians of Reno whom I knew, and stated to them the active ingredients of the preparation, and that figs were used in small quantities merely to give a pleasant taste, but

that I had given it in a fanciful way the name "Syrup of Figs." And those physicians recommended and prescribed the remedy and sent customers to me to purchase the same; and I made similar statements to those with whom I came in contact.

Q. 15. How long did you manufacture and sell this product on your own account?

A. For some months afterward. That is, I continued in the business there, selling it as a retail druggist, until 1883, but the California Fig Syrup Co., the complainant, was organized on December 6, 1881, and I then sold and conveyed all my right, title and interest in the business, trademarks, names, wrappers and labels and goodwill of the business of manufacturing and selling this medicine, to the complainant.

Q. 16. Were you active in bringing about the formation of the complainant company? A. Yes, sir.

Mr. OLNEY.—I offer in evidence a certified copy of the articles of incorporation of the California Fig Syrup Co., certified to by the County Clerk of Washoe county, Nevada, and by the presiding judge of the judicial District of Nevada, which includes Washoe county, and the attestation by said judge and by the clerk of the Court in which it was formed.

(Marked "Complainant's Exhibit J.")

(It is stipulated between the respective counsel that the document, Complainant's Exhibit "J," may be withdrawn from the files upon substitution of a correct copy thereof approved by the Examiner.)

Q. 17. What did the complainant do after its organization in the way of manufacturing this medicine?

A. The complainant continued manufacturing in a small way at Reno, Nevada, until the fall of 1883, when I was elected general manager of the company and came to San Francisco in pursuance of the original intention of opening a manufactory in this city.

Q. 18. It did enter upon the business then in the State of Nevada manufacturing this product?

A. Yes, sir.

Q. 19. Where is the principal place of business of this corporation? A. At Reno, Nevada.

Q. 20. It is organized under the laws of the State of Nevada? A. It is.

Q. 21. If it has any branches, state where.

A. It has commercial offices in this city, Louisville, Kentucky, New York, London, and Montreal, Canada.

Q. 22. Then do I understand you that the place of business of the corporation is Reno, Nevada, but it has commercial offices in this city and in other cities?

A. Yes, sir.

Q. 23. How long did it keep up the manufacture of this product?

A. It has continued to manufacture it down to the present time.

Q. 24. Where does it manufacture this product? Mention some places where it is manufactured?

A. It is manufactured in this city, San Francisco, California, and at Louisville, Kentucky.

Q. 25. Do you know the methods by which the complainant manufactures its product? A. I do.

Q. 26. Have you kept charge of that matter and kept yourself informed in regard to it at all times?

A. Yes, in a general way.

Q. 27. Is there anybody besides yourself who has had the active management of this corporation so far as manufacturing this medicine is concerned?

A. There are trusted employés who have been allowed to do the manufacturing.

Q.28. But the general management, has any one had charge of that except yourself?

A. Not since 1883.

Q. 29. To what extent do figs enter into the composition of this medicine as prepared by complainant?

A. We use about ten pounds of figs to each one hundred gallons of medicine. That is, we use the soluble substance of about ten pounds of figs, which amounts to a little less than one per cent of the medicine.

Q. 30. What efforts did you first, and the complainant after you, make for the purpose of bringing the medicine to the attention of physicians and the public? State fully.

A. After starting a manufactory in this city, and for a year or so prior to that time, some reading notices were inserted in the newspapers of the Pacific Coast, and, in 1885, I went to Louisville, Kentucky, and established a branch office and manufactory there. Our capital at that time was limited, and we were obliged to build up the business gradually and slowly, and in 1886 and 1887, while the business was still, comparatively speaking, in its infancy, we decided to advertise more largely; and in the year 1887 we commenced to place advertisements in medical journals, stating, for the information of physicians, the composition and active ingredients of the preparation;

and in that same year I commenced, acting as manager of complainant, to have the representatives of the California Fig Syrup Co. visit physicians at medical conventions and in their offices, with instructions to give samples of the remedy to physicians to request them to try it in their practice, and to state to them the active ingredients of the preparation, that a small quantity of figs were used simply to promote a pleasant taste, and to give them such other information as they might desire in regard to the manufacture and sale of the article.

Q. 31. In that connection did you or did you not make any special effort to attract the notice of physicians to the article and get them to recommend it to their patients?

A. We did make a special effort, believing that it would be greatly to our advantage to secure the approval and recommendation of physicians. We have continuously, down to the present time, advertised the facts in leading medical journals very extensively and continuously and spending many thousands of dollars to inform physicians that the active principles, the active laxative parts of the preparation are obtained from senna, combined with aromatic carminatives, and that other substances are used, such as sugar, water and a small quantity of juice of figs.

Q. 32. What was the result of your efforts in calling the attention of physicians to this medicine?

A. It resulted in a very large recognition and acceptance, on the part of the medical profession, of complainant's preparation, as an excellent laxative remedy, and

in their recommending and prescribing the same, and a large increase in our sales.

Q. 33. Have you in Court any samples of the advertisements that you made use of in mdical journals calling the attention of physicians to the character of the medicine? A. I have.

Q. 34. Did you advertise in any other journals except strictly medical journals, the qualities of your medicine and the purpose for which it was adapted, outside and independent of newspapers of general circulation?

A. I did.

Q. 35. What was the character of those journals?

A. Certain monthly publications with which I placed advertisements on the advice of a physician, stating that he thought it advisable to give information to the readers of those publications that he regarded them as people who would appreciate a statement as to the excellence of our laxative remedy and as to its composition.

Q. 36. I show you a journal entitled "Annals of Hygiene, a Journal of Health," dated December, 1893, and being the issue of that date of that journal. State if that page which I show you contains one of the advertisements inserted by the complainant company, or which it caused to be inserted? A. It does.

Mr. OLNEY.—I offer in evidence the advertisement contained on page 10 of the advertising supplement. I will offer that page as an exhibit, Complainant's Exhibit "K," and ask the reporter to copy it into the record, and I hereby offer at any time when this case is on argument, or at any time when counsel may desire, that the book

which contains the exhibit shall be subject to his order and disposition.

Mr. MILLER.—If the page is to be offered I object to the book being taken away, because I want the whole book here. I can't get any idea just from a page alone, and there are other parts of the book that I want to see.

Mr. OLNEY.—If it is simply the book that you want to see, I can let you have the book at your office and take your receipt for it.

Mr. MILLER.—I don't think the Examiner would allow that.

Mr. OLNEY.—Then I offer the page in evidence.

Mr. MILLER.—We object to the page being taken out of the book and being offered in this way in evidence, because the page alone does not show the character of the book nor the other parts of the book, which I desire to see.

Mr. OLNEY.—Then I will offer the whole book in evidence.

(Marked "Complainant's Exhibit K.")

Mr. OLNEY.—I offer in evidence the February number for the year 1893, of the magazine or journal called "Food," and purporting to be a journal of hygiene and nutrition, the half-page advertisement of the complainant on page 8 of the advertisements in said journal, an advertisement that is worded like the advertisement, Exhibit "K," and I ask that this be marked "Complainant's Exhibit L."

(Marked "Complainant's Exhibit L.")

Q. 37. And I will ask you if the complainant caused that advertisement to be inserted in that journal?

A. I did.

Q. 38. I show you the number dated February, 1894, of the "Dietetic and Hygienic Gazette," a monthly journal of physiological medicine, and call your attention to page 2 of the advertisements, and ask you if the complainant caused that advertisement to be inserted in that journal? A. I did.

Q. 39. (By Mr. MILLER.)—Where is that published?

A. New York.

Q. 40. By whom?

A. There is the name, Gazette Publishing Co., 1218 Broadway.

Mr. OLNEY.—We offer that in evidence, and ask that it be marked "Complainant's Exhibit M."

(Marked "Complainant's Exhibit M.")

Q. 41. I show you a journal or magazine entitled "Humanity and Health"; the number is that of December, 1894. I call your attention to the advertisement on the next to the last sheet in that journal, and ask you if the complainant caused that advertisement to be inserted?

A. It did.

Mr. OLNEY.—We offer that in evidence.

(Marked "Complainant's Exhibit N.")

Q. 42. I show you a periodical entitled, "The American Journal of the Medical Sciences, published in Philadelphia by Lea Bros. & Co., edited by Edward P. Davis, A. M., M. D., with the co-operation in London of Hector McKenzie, A. M., M. D., F. R. C. P., and I call your attention to the advertisement on page 12 of the advertising supplement of the magazine, and ask you if the complainant caused that advertisement to be inserted?

A. It did.

Mr. OLNEY.—I offer that in evidence and ask that it be marked "Complainant's Exhibit O.")

(Marked "Complainant's Exhibit O.")

Q. 43. I show you a journal entitled "The Trained Nurse and Hospital Review," for December, 1894, and call your attention to a full-page advertisement in the back part of that journal purporting to be by the California Fig Syrup Co., and ask you if the complainant caused that advertisement to be inserted? A. It did.

Mr. OLNEY.—I offer that in evidence and ask that it be marked "Complainant's Exhibit P."

(Marked "Complainant's Exhibit P.")

Q. 44. I show you a journal entitled "The American Analyst, a popular analyst for the family and consumer, of everything relating to man's physical need and comfort," dated December, 1893; and I call your attention to the second page and fronting the first page of reading matter, to an advertisement purporting to be by the complainant, and ask you if the complainant caused that advertisement to be inserted? A. I did.

Mr. OLNEY.—I offer that in evidence and ask that it be marked "Complainant's Exhibit Q.")

(Marked "Complainant's Exhibit Q.")

Q. 45. I show you a journal entitled "Jenness Miller Monthly, conducted by Mrs. Jenness Miller" ; the date is March, 1895; and I call your attention to the advertisement on page 42, purporting to be by the complainant company, and ask you if the complainant caused that advertisement to be inserted? A. It did.

Mr. OLNEY.—I offer that in evidence and ask that it be marked "Complainant's Exhibit R."

(Marked "Complainant's Exhibit R.")

Q. 46. Mr. Queen, are you acquainted with a medical work entitled "Diseases of the Rectum," by Joseph M. Matthews, M. D., Professor of Principles and Practice of Surgery and Clinical Diseases of the Rectum, Kentucky School of Medicine, President of Louisville Clinical Society, and apparently a member of many other societies. Are you acquainted with this work? A. I am.

Q. 47. I call your attention to the following language used on page 279: "However, there are cases which, perforce of circumstances, cannot be operated on. In such we have to pursue the following plan: first, have the patient clear the intestinal tract by taking a good aperient. He should then be provided with a mild laxative to keep on hand in order to keep the bowels slightly soluble. The preparation known as 'Syrup of Figs' answers very nicely for this purpose. Its purgative action is obtained from the use of senna. Children especially can take this medicine easily." Do you know whether or not Dr. Matthews referred to complainant's preparation when he spoke of this term—when he used the term "Syrup of Figs"?

Mr. MILLER.—We object to that as incompetent, irrelevant and immaterial, and an effort to interject into the case the mere statements of some third person not under oath, and therefore it is not competent evidence.

Mr. OLNEY.—Counsel for complainant states that he proposes before the case closes to prove that Dr. Matthews and his book, from which I have just read, is re-

garded by physicians as a competent authority upon the question of diseases of the rectum and of medicine used in those diseases.

Mr. MILLER.—Counsel well knows that such would not counteract the objection which has been made, and make competent evidence that which, according to the fundamental rules of evidence, is not competent, to wit, the unsworn statements of a third person. And I want to add the further objection, that it is utterly impossible for this man, the witness on the stand, or for anybody else, to know what another man meant in the way indicated by the question.

A. I know that he referred to complainant's preparation.

Q. 48. Now, after you had called the attention of physicians to the merits of this composition or medicine, did the complainant company do anything to call the attention of the public generally to it? And if so, what was done?

A. Some statements were published in certain monthly publications, beginning with the year 1888 down to the year 1893, stating the composition of the remedy, and calling attention to its merits, but we did not begin to publish in newspapers generally the statement that the active laxative medicinal principles were obtained from senna and combined with aromatic carminatives until the year 1893. Since that time we have published very extensively throughout the United States in the leading newspapers and in many thousands of newspapers similar statements; and with the beginning of the year 1894, we commenced to have small pamphlets or folders dis-

tributed from house to house throughout the United States, Canada and Great Britain, containing the same or similar statements; and the complainant had more than fifteen million or twenty million of these folders so distributed by a large number of traveling men and other employés, and has spent a great many thousands of dollars in publishing the facts as to the composition of the remedy to the public generally throughout the United States since 1893, in addition to the general statements which we have published from the beginning of the business down to the present time as to the merits of the remedy.

Q. 49. Have you a sample of those folders that you began to circulate in 1893 and 1894? (The witness produces.) I show you a folder purporting to be issued by the complainant company, and ask you if that is one of the folders circulated as stated in your last answer?

A. This is one of the folders which we commenced to put out in the early part of the year 1894, and to distribute throughout the United States.

Mr. OLNEY.—We offer this in evidence, and ask that it be marked "Complainant's Exhibit S.")

(Marked "Complainant's Exhibit S.")

Q. 50. I show you Exhibit "C[2]," attached to the bill of complaint, and ask you to state what it is, and whether or not that is a folder that has been extensively circulated by complainant, and, if so, to what extent?

A. It is. We have had millions of them distributed.

Q. 51. Anywhere else except in California?

A. All over the United States and Great Britain.

Q. 52. Canada?

A. We have distributed in Canada. I am not sure whether this same folder has been used in Canada. We have distributed in Canada similar folders.

Q. 53. I show you Exhibit "C[1]," attached to the bill of complaint, and I ask you what it is?

A. It is one of complainant's half-page advertisements.

Q. 54. Did the complainant cause that to be inserted in newspapers throughout the country?

A. Yes, the complainant had this advertisement inserted in many leading newspapers in the United States.

Q. 55. In any other country except this country?

A. Not the same advertisement, I think.

Q. 56. Is that a sample or type of the advertisements that the complainant caused to be inserted in the newspapers of the country? A. Yes, sir.

Q. 57. I show you Exhibit "C[3]," attached to the bill of complaint, and ask you if this is a folder or circular issued and circulated by the complainant company?

A. It is.

Q. 58. To what extent has that circular or folder been circulated throughout the United States?

A. Several millions of copies.

Q. 59. Can you state in round numbers the amount of money expended by complainant in advertising its medicines?

A. It has expended more than one million dollars prior to the beginning of this suit.

Q. 60. What has been the extent of the sales of com-

plainant company of this medicine known as "Fig Syrup"?

A. About two million bottles annually for some years past.

Q. 61. By what name has that medicine been known in the drug trade?

A. Known indifferently by the name "Syrup of Figs" or "Fig Syrup." It is called for in ordering, under either name.

Q. 62. Did you take pains to ascertain before you gave that name to your medicine, whether or not the name has ever been used before? A. I did.

Q. 63. What did you find out about it?

A. So far as my investigation enabled me to know, I found that it had never been used before.

Q. 64. Do you know whether there has been at any time upon the market in this country any product by the name of "Syrup of Figs" or "Fig Syrup," other than that of complainant's production?

A. My knowledge and investigations throughout the United States have convinced me that there was no other article manufactured or sold under the name of "Syrup of Figs" or "Fig Syrup" until some years after the complainant's preparation was well known and generally advertised throughout the United States; but since that time imitations have appeared upon the market under similar names.

Q. 65. Have there been any products upon the market at any time to your knowledge called "Syrup of Figs" or "Fig Syrup" except the complainant's preparation and imitations thereof?

A. To the best of my knowledge there never has been.

Q. 66. What means have you of knowing whether or not any such article has been made or sold, or whether any article has been made or sold, under the name of "Syrup of Figs," except your production?

A. I have consulted with physicians and druggists throughout the United States, and made special inquiries, and also examined the textbooks recognized by druggists as standard works on pharmaceutical preparations; also the price lists of various establishments.

Q. 67. Has the complainant company any agents or means by which it can ascertain whether or not there is any article upon the market of the name of "Syrup of Figs"?

A. We have our agents and travelers scattered throughout the United States with instructions to keep us informed on the subject.

Q. 68. Have you, by any of the means used by complainant, ascertained that any article named "Syrup of Figs" has ever been made or sold in the United States except the complainant's production or imitations thereof?

A. I have known as the result of the statements of our agents and representatives that no such product exists.

Mr. MILLER.—I move to strike out the answer, on the ground that it is purely hearsay.

Q. 69. (By Mr. OLNEY.)—By what term is the complainant's preparation designated in the trade when an order is given at any time?

A. By the name "Syrup of Figs" or "Fig Syrup."

Q. 70. I show you Exhibit "A," attached to the bill of

complaint, and being a carton or box in which the medicine is enclosed. I will ask you if that truly represents the box or carton in which the complainant's preparation is enclosed? A. It does.

Q. 71. Is that a sample of the box?

A. It is a sample of the box in which all bottles of complainant's preparations are enclosed and sold to the trade.

Q. 72. I show you Exhibit "B," attached to the bill of complaint. Is that a bottle in which complainant puts up its preparation?

A. This is the bottle which is uniformly used in putting up complainant's preparation, and the label which appears uniformly on the bottle.

Q. 73. I show you Exhibit "D," attached to the bill of complaint, marked on the outside "Hayes street Pharmacy, May 10, 1897. R. E. Q." Did you ever see that before? A. I have.

Q. 74. Where?

A. At the drugstore of J. A. Bright at the northwest corner of Hayes and Laguna streets, in this city.

Q. 75. State the circumstances under which you saw and how you got it, if you did get it, and all about it.

A. On or about May 10, 1897, I went into the drugstore of J. A. Bright, corner of Hayes street and Laguna, and asked for a bottle of "Syrup of Figs." The young man behind the counter, apparently in charge of the store, asked me if I would have a twenty-five cent or thirty-five cent bottle.

Mr. MILLER.—We object to any conversation between this witness and the young man apparently in charge of

the store, referred to by him, on the ground that it is entirely hearsay, and was made not in the presence of the defendants or any of them, and therefore it is utterly incompetent.

Q. 76. (By Mr. OLNEY.)—Go ahead with the conversation.

Mr. MILLER.—And I notify counsel now that I shall move the Court to strike out the testimony at the proper time.

A. I asked him to show me the bottles. He went to the shelf where this bottle and some others like it were standing and picked up the package. I said to him: "What is the difference between the two"? And he replied that it was made by different companies. I then asked who made this package which he handed me. He replied, "The San Diego Fig Syrup Co." I said: "All right, I will take that bottle." He then went and wrapped it up and I paid him for it, twenty-five cents. He handed it to me, and I said: "Is it not a fact that this was made by Clinton E. Worden & Co."? And he said: "Yes." I then said: "I shall have to bring suit against you for selling the same." And he said that the proprietor was not in then, and asked me to call and see the proprietor. I went back a day or two later and met a man who said that he was the proprietor of the store, and I told him that he was infringing on our legal right, and that unless he would agree to discontinue, I should have to bring suit against him. He then said to me that he had been induced by the representative of Worden & Co. to sell the article, although he did not at first wish to do so, but that Worden & Co.'s representative had stated to

him that he had a right to sell this imitation because we lost a suit in the East on account of having no figs in our preparation. I said to him again that I would have to bring a suit unless he would promise to discontinue. And he replied: "I don't wish to go into Court, but if called upon or subpoenaed I will go before the Court and state the truth in the matter." However, he did not promise me that he would discontinue the sale of the article; at least, I didn't so understand him. And I therefore reported the case to our attorney, and requested that suit be brought against him, which was done.

Mr. MILLER.—Do you contend that this conversation is competent evidence?

Mr. OLNEY.—Undoubtedly.

Mr. MILLER.—I move to strike out the entire answer of the witness on the ground that it is purely and palpably hearsay testimony, not binding upon defendants or any of them in this suit, and therefore not competent evidence; and I notify counsel now that I shall apply to the Court to have the deposition suppressed on that ground.

Q. 78. (Mr. OLNEY.)—I show you Exhibit "E," attached to the bill of complaint, and endorsed on the back of it "Fairmount Pharmacy, May 7, 1897, R. E. Queen," and I ask you if you ever saw that before, and if that endorsement is in your handwriting?

A. I have seen this package before, and the endorsement is in my handwriting.

Q. 79. State the circumstances under which you saw it and how you obtained it and how you came to make that endorsement.

A. On or about May 7, 1897, I went to the Fairmount

Pharmacy in this city and asked for a bottle of "Syrup of Figs." The man behind the counter, apparently in charge of the store, went to his show-window and picked out a package—

Q. 80. (Interrupting.) Wait a moment. Do you know who was the proprietor of that Fairmount Pharmacy?

A. He stated to me that he was the proprietor and that his name was C. J. Schmelz.

Mr. MILLER.—I move to strike out the answer on the ground that it is purely hearsay testimony, not made in the presence of these defendants or any of them, and therefore incompetent.

Q. 81. (By Mr. OLNEY.)—Go ahead.

A. After taking up the package he turned to where I was standing, behind his counter, and said to me, "We have the Fig Syrup Co.'s." I said: "All right! give me a bottle." He wrapped it up and I paid him twenty-five cents for the same.

Q. 82. Is that the bottle?

A. That is the bottle. I then stepped aside while he waited upon a customer, another customer who had approached the counter at that time, and when he had finished waiting upon the customer, I said to him: "Will you tell me who made this preparation?" He replied: "Worden." I then asked: "Clinton E. Worden & Co.?" He said: "Yes." I said: "I am the manager of the California Fig Syrup Co. You are deceiving our customers, infringing upon our legal rights, and, unless you agree to discontinue, I shall have to bring suit against you." He then said: "I know it is not right to do so, but owing to the cutting of the prices of proprietary medicines in this

city, a druggist has to resort to something of the kind in order to make a living." I then said: "Will you agree to discontinue if I do not bring suit at all against you?" And he replied: "I have not money to spend in fighting lawsuits, and I wish you would call again before taking any action in the matter." I said to him: "Well, you have only to state whether or not you will discontinue the sale of the article." And he replied: "I wish to see Mr. Worden first. Will you not call again?" I said: "Yes, I will call again." And I did call at this store twice after that and was told each time that he was out. I then informed our attorney and instructed him to bring suit.

Mr. OLNEY.—That is not relevant. Strike that out.

Mr. MILLER.—It is just as much evidence as the other.

Q. 83. (By Mr. OLNEY.)—I show you Exhibit "G," attached to the bill of complaint, and endorsed on it, "Ariel Pharmacy, May 11, 1897, R. E. Q.," and ask you if you have ever seen that before, and whether that endorsement is in your handwriting?

A. I have seen this package before, and it is in my handwriting.

Q. 84. Will you state the circumstances under which you saw it and how you obtained it?

A. I bought it on about May 11, 1897, at a drugstore on Hayes street, the Ariel Pharmacy. I went in and asked for a bottle of "Syrup of Figs," and the man behind the counter, apparently in charge of the store, asked me if I would have a small or a large bottle. I replied, a small bottle, and he handed me this package, and I paid him twenty-five cents for the same and left the store. I

went a day or two later to see him again. I told him that I was the manager of the California Fig Syrup Co., and would bring suit against him unless he discontinued selling the imitation of that preparation, which he had sold me a day or two previously. He replied that I could do as I liked about the matter; that he had an understanding or agreement with Mr. Worden, who manufactured the article, and that Mr. Worden would protect him.

Q. 85. Did he say who he was?

Mr. MILLER.—I move to strike out the answer of the witness just given on the ground that it is hearsay, utterly incompetent, irrelevant and immaterial as to Worden or any of the defendants, and not made in their presence.

A. He stated that he was T. F. Bacon, the proprietor of the store.

Mr. MILLER.—I move to strike out the answer to the last question on the same ground, to wit, that it is hearsay, and therefore incompetent, irrelevant and immaterial.

Q. 86. (By Mr. OLNEY.)—Do you know whether or not any person or corporation, prior to the time you put upon the market the preparation known as "Fig Syrup" or "Syrup of Figs," packed or dressed medicine in the form of Exhibits "A," and "B," which you have already testified to. The question is, if you know.

A. I had considerable experience in the drug business, and made examination of a great many drugstores and inquiries of a great many druggists and the trade generally.

Q. 87. And from those inquiries what would you state?

A. That no such—

Mr. MILLER (Interrupting).—We object to the question as incompetent, irrelevant and immaterial, and calling for hearsay testimony, and the statements of third parties not parties to this action, and not made in the presence of any of the defendants.

A. (Continuing.)—Based upon my experience and investigation, I would state that no preparation was ever put up in a package like the complainant's preparation, and marked with the name of "Syrup of Figs" or "Fig Syrup" before complainant's preparation was placed upon the market.

Q. 88. (By Mr. OLNEY.)—Do you know whether there has ever been a corporation of the name of California Fig Syrup Co., or a similar name, in California, or anywhere else in the country?

(Objected to as incompetent, irrelevant and immaterial, because the suit is not based upon any infringement of corporate name.)

A. To the best of my knowledge, no such corporation existed prior to the existence of complainant in this case.

Q. 89. Did you do or has the complainant done anything in regard to registering the name "Syrup of Figs" in the United States Patent Office?

(Objected to as incompetent, irrelevant and immaterial, because the suit is based upon the common-law right, and not upon any right conferred by any laws of the United States, or dependent upon any registration of any trademark under the laws of the United States; and I want to

add the further objection that the certificate of registration is the best evidence of the fact.)

A. It was registered in the United States Patent Office about the year 1885.

Q. 90. Have you the certificate of registration?

A. I think not. Not to the best of my knowledge. It was filed in some case by my attorney or one of our attorneys, and it is not in my possession.

Q. 91. To what extent do the drugstores generally throughout the country carry the complainant's production?

(Objected to as incompetent, irrelevant and immaterial, because it is plainly and palpably a fact that the witness could not personally know without having visited each and every drugstore in the United States, and seen the extent of their trade in the article in question. Such knowledge as he may have, if any, is hearsay and, therefore, incompetent.

Q. 92. (By Mr. OLNEY.)—Question continued, and state the source of that information.

A. I have visited many drugstores in the large cities of all sections of the United States, and in a great many of the small cities and towns. I have personally examined their stocks, and found that they had "Syrup of Figs" for sale made by complainant. I have also received orders from all sections of the United States, many thousands of them, from the principal drugstores in the leading towns of the United States, and from all sections of the United States, and I have sent agents of the company to all sections of the United States to examine and report and make sales, and from my own personal investi-

gations and knowledge of the facts and of the orders received, and the extent of the sales and the reports of the agents of the company complainant, I know that "Syrup of Figs" is for sale by nearly all the druggists in the United States.

Mr. MILLER.—I move to strike out the answer on the ground that it is based on hearsay testimony, and, therefore, incompetent.

Q. 93. (By Mr. OLNEY.)—Do you know of any article of trade or commerce made from figs and in the nature of a syrup of figs? A. I do not.

Q. 94. Have you ever heard of any such product?

A. I have not.

Q. 95. If a preparation was made from figs, in the nature of a syrup, would it be of any value?

(Objected to as incompetent, irrelevant and immaterial.)

A. Not as a laxative medicine, and probably would have no commercial value, owing to the properties of the fig substance.

Q. 96. What is the value of the good-will of complainant's business, in round numbers?

(Objected to as incompetent, irrelevant and immaterial, first because it is utterly impossible for the witness to fix the value of it, other than by guessing at it, which would be improper; and in the second place this is not a suit to enjoin and prevent defendants from using the so-called trademark of "Fig Syrup" or "Syrup of Figs," and, therefore, the question of the value of complainant's good-will is incompetent, irrelevant and immaterial.)

A. Based upon the earnings of the company, which have amounted to a little more than five per cent of one million dollars, for some years past. I would state that the good-will of the business is of a value of not less than one million dollars.

Q. 97. (By Mr. OLNEY.)—Do you know of your knowledge whether or not Clinton E. Worden & Co., one of the defendants herein, have tried to induce retail druggists to purchase the imitation made, the article made by Clinton E. Worden & Co., and which is claimed to be an imitation of complainant's article, and offered it at a lower price than the complainant's article.

Mr. MILLER.—We object to that as incompetent, irrelevant and immaterial, because the suit is based upon an alleged infringement of trademark or trade name, and not upon any other acts or doings on behalf of defendant.

A. I don't know that of my own knowledge.

Q. 98. (By Mr. OLNEY.)—I show you Exhibit "F," attached to the bill of complaint here, and ask you if you have ever seen that exhibit, and if so, state the circumstances under which you saw it, and how you came to be in possession of it.

A. I have seen this exhibit before, on or about the tenth day of May, 1897. I went to the drugstore at the southeast corner of Kearny and Sacramento streets, in this city, where the sign "Lucius Little, Proprietor," then appeared upon the show-window of the drugstore. I went into the drugstore and asked for a bottle of "Syrup of Figs." The druggist took down a bottle from his shelf, wrapped it up and handed it to me, and I asked him the

question, "Who made this preparation?" He answered, "The California Fig Syrup Co.," and then he added in a somewhat indistinct voice, "Out on Haight street," or "Hayes street." I understood him to say "Haight street," but I may have misunderstood him. I picked up the package, and laying down the money, I said to him. "This was made by the California Fig Syrup Co., was it?" And he replied, "Yes." I then took the package and left the store.

Mr. MILLER.—We move to strike out the answer of the witness, first, on the ground that it is hearsay testimony, of what purports to be a conversation between him and another person, not in the presence of the other defendants, and therefore not binding in any way upon them, and, therefore, it is incompetent, irrelevant and immaterial, and at the proper time we shall move to suppress it.

Q. 99. (By Mr. OLNEY.)—What part of the city does complainant conduct its manufactory in?

A. On Hayes street.

(Further hearing adjourned to Wednesday, October 12, 1898, at 10 A. M.)

Examination-in-chief of

R. E. QUEEN, resumed.

(Note by stenographer—This testimony was taken at the forenoon session of October 13, but by request of the respective counsel is transcribed into the record at this point.)

(By Mr. OLNEY.)

Q. 100. Mr. Queen, I show you a newspaper cutting entitled "A Family Laxative," and ask you whether or not a notice similar to that was published in the newspapers of the United States, and if so, to what extent, and at what time?

A. This is an advertisement of a reading notice which the complainant had inserted in the newspapers generally throughout the United States, beginning in December, 1893, and throughout 1894. The complainant has it inserted in several thousand newspapers.

Mr. OLNEY.—I offer it in evidence and ask that it be marked "Complainant's Exhibit T."

(Marked "Complainant's Exhibit T.")

Q. 101. Mr. Queen, how is the complainant company addressed in its communications by the public generally?

(Objected to as incompetent, irrelevant and immaterial, because the suit is not for an infringement of complainant's name; and even if it were it is not charged that the defendants infringed the name; but the suit is simply for the use of the expression "Syrup of Figs," as applied to a medicine.)

A. The complainant company is generally addressed by its correct title, the "California Fig Syrup Co.," but is frequently addressed simply as the "Fig Syrup Co.," or the "Syrup of Figs Co." We receive letters and telegrams addressed in all three forms. These letters and telegrams are delivered to complainant by the postal and telegraph authorities, addressed to the "California Syrup of Figs Co.," the "Fig Syrup Co.," or the "Syrup of Figs Co."

Q. 102. What meaning is given by the trade in proprietary medicines, and by the public generally, to the term or words, "Syrup of Figs" or "Fig Syrup"?

(Objected to as incompetent, irrelevant and immaterial.)

A. The complainant's preparation is intended to be meant by that name.

Q. 103. Do you know whether or not the business name, "California Fig Syrup Co.," was ever used by any person or corporation prior to the use or it by the complainant, and if you have any knowledge or information on the subject, state what it is and the sources of your knowledge?

Mr. MILLER.—We object to that as incompetent, irrelevant and immaterial, because there is no question here regarding the name of the complainant company, the suit not being brought to restrain the use of the company's name, but only the sale of the medicine under the name of "Syrup of Figs."

Mr. OLNEY.—If counsel will admit the allegation contained in the bill of complaint, as follows, "That your orator and his predecessors in interest was the first person or firm or corporation engaged in the manufacture of a liquid laxative preparation, to adopt the business name of "California Fig Syrup Co." or "Fig Syrup Co.," or a business name of which the words, "Fig Syrup" were a part—if that is admitted to be true, I will withdraw the question.

Mr. MILLER.—We do not feel called upon to make any such admission. The suit has been brought against us for the use of that name, and ,therefore, we consider

it entirely immaterial, and, therefore, we do not feel called upon to make any such admission on the subject.

Mr. OLNEY.—I insist upon the question then, and ask the witness to answer.

A. The complainant was the first to adopt the name "Fig Syrup Co.," or "Syrup of Figs Co.," or "California Fig Syrup Co.," as it is generally known, to the best of my knowledge and belief. About the time of adopting the name, I made inquiries of druggists and physicians, and examined textbooks and price-lists generally in use in the drug trade and was unable to find that the name had been used by any other company; and, afterward, I had an extended tour throughout the United States, and, in visiting the drug trade and investigating all matters of interest to the company, I was unable to find any company having the name "Fig Syrup Co.," or "Syrup of Figs Co.," existing in the United States.

Q. 104. Did you find that any person or firm had used the name "Fig Syrup Co.," or "Syrup of Figs Co.," or used a name in which the words "Syrup of Figs," or "Fig Syrup," formed a part, as a business name?

(The same objection.)

A. I didn't find that any person, or persons, or firm or other party had used the name "Fig Syrup" or "Syrup of Figs" as a part of the business name of any firm, company or corporation, until the appearance of some of the imitations upon the market, which purported to be made by various "Fig Syrup Cos.," but which I was informed were really made by Clinton E. Worden & Co., and other parties.

Mr. OLNEY.—I now formally offer in evidence all of the exhibits attached to the bill of complaint herein, namely, to wit, Exhibits "A," "B," "C," "C,[1]" "C,[2]" "C,[3]" "D," "E," "F," "G," "H," and "I."

Mr. MILLER.—We object to each and every one of them as incompetent, irrelevant and immaterial, on the ground that no evidence is introduced to identify them, or to show their use, or explain in any way whatever what they are.

Mr. OLNEY.—I also give notice that upon the hearing of this case, I shall read from a book, entitled "Diseases of the Rectum," by Joseph M. Matthews, M. D., that portion on page 279, relating to syrup of figs.

Cross-Examination.

(By Mr. MILLER.)

X. Q. 1. In what year did you say you commenced to experiment on this medicine? A. In the year 1878.

X. Q. 2. That was at Reno, Nevada, was it?

A. It was.

X. Q. 3. Were you at that time a clerk in a drugstore there?

A. No, sir; I was the proprietor of a drugstore there.

X. Q. 4. How long did your experiments continue before you perfected the medicine?

A. I didn't perfect the medicine as it is now prepared until the year 1885 or 1886; that is, I continued to make improvements and changes in the preparation down to that time.

X. Q. 5. When did you first get it into such shape as to put it on the market?

A. Early in the year 1879.

X. Q. 6. That was at Reno, was it? A. It was.

X. Q. 7. In what way did you put it on the market at that time?

A. I visited physicians and told them what I had made, and what its active ingredients were, and asked them to try it and recommend it to their patients. I think I also caused some reading notices to be inserted in newspapers, calling attention to the merits of the article, and I sold it to customers who called at my drugstore.

X. Q. 8. What newspapers did you advertise in at that time?

A. To the best of my recollection, the local newspapers, published at Reno, Nevada, the daily papers published there at that time, one or more of them.

X. Q. 9. What was the name of the paper?

A. The "Gazette" and the "Journal." I don't remember positively that the advertisements were placed in those papers that same year, but they were afterward placed in them.

X. Q. 10. You were the sole proprietor of the medicine at that time? A. I was.

X. Q. 11. What kind of bottles did you use at that time?

A. I used a bottle of the same shape, but made of green glass, and, to the best of my recollection, the name of the preparation was not blown in the bottles at that time.

X. Q. 12. (By Mr. ROWE.)—Similar to the ones you used to-day?

A. Yes, sir; smaller in size, in proportion and the price.

X. Q. 13. (By Mr. MILLER.)—What labels did you use on the medicine at that time?

A. We used a label similar to the label which we now use; that is, the name was printed on the label, and directions were printed on the label for use. But I don't remember the exact wording of the labels.

X. Q. 14. Have you one of those labels now?

A. I think not. To the best of my knowledge and belief, we have not.

X. Q. 15. Do you mean by your testimony to imply that the reading on the label was exactly the same as at present?

A. I mean that the wording may have been different, but that the directions were, I think, substantially the same as at present.

X. Q. 16. What was the wording on that label with regard to the figs used in the composition?

A. To the best of my recollection no mention was made of the figs, except in the name at that time.

X. Q. 17. Was the label which you were then using, similar in reading matter to the label which you were using when your company, the California Fig Syrup Co., brought the suit in this Court against the Improved Fig Syrup Co.?

A. The label had been changed at that time. In the year 1889, we placed upon the label the words, "California Liquid Fruit Remedy," for the first time. And we removed that phrase from the label in May, 1894. I speak

of the label which is pasted upon the bottle, not on the outside wrapper.

X. Q. 18. Did you have those words, "California Liquid Fruit Remedy," on the labels when you were selling the medicine for yourself in Reno, Nevada?

A. I did not.

X. Q. 19. When did you first put that name on there?

A. In May, 1889.

X. Q. 20. Have you none of those early labels in your possession or under your control?

A. I can't state without an exhaustive search of old papers and documents in possession of the complainant.

X. Q. 21. Did you use any wrappers at that time beside the label? A. We did.

X. Q. 22. What did the wrapper contain?

A. Do you speak of the inside wrapper?

X. Q. 23. Any wrapper that was used in connection with the medicine.

A. We used an inside wrapper and an outside wrapper. The inside wrapper, in addition to the name and the name of the complainant company, after the complainant was organized and incorporated, contained, besides directions for use, a general description of the nature and properties of the article.

X. Q. 24. Did it state anything in regard to the constituents of the medicine?

A. On the wrapper that was in use in 1896, down to July, 1896, but which was not the original wrapper, both the inside and outside wrappers having been changed in 1889, the statement appeared that the preparation presented, "in the most elegant form, the laxative and nu-

tritious juice of the figs of California, combined with medicinal virtues of plants, known to act most beneficially on the human system, to form an agreeable and effective laxative," and other words following as to the complaints for which it would be beneficial.

X. Q. 25. Those words were contained on the circular or wrapper or label used by you, in connection with this medicine at the time you brought the suit in this Court against the Improved Fig Syrup Co., were they?

A. They were.

X. Q. 26. And when did you remove those words from the label? A. July, 1896.

X. Q. 27. Those words were also used, were they not, at the time you brought the suit against Frederick Stearns & Co. in the Circuit Court for the District of Michigan, I believe, were they? A. They were.

X. Q. 28. And they were also used on the labels when you brought the suit against Putnam at Boston?

A. They were.

X. Q. 29. Now, I shall request you to make a search, if you can, and produce one of the labels which were used on this medicine when you first originated it at Reno, Nevada, and before the incorporation of the California Fig Syrup Co., and ask you to produce it at a subsequent hearing of this case. Now, how long did you continue to manufacture this medicine and sell it at Reno, Nevada, on your own account?

A. Down to December 6, 1881, although, a short time previous to that, I arrived at an understanding with some other parties that they would form a company to manufacture and sell this preparation. At first we had an

idea of forming a partnership, but finally decided to incorporate.

Mr. OLNEY.—That is immaterial.

The WITNESS.—These parties decided then to incorporate and organized the complainant.

X. Q. 30. Now, at the time you were manufacturing and selling the medicine on your own account at Reno, up to December 6, 1881, as you have testified, where was the medicine manufactured, and by whom?

A. It was manufactured by myself and by my partner there at the time at Reno, Nevada, at our drugstore.

X. Q. 31. What was the name of your partner?

A. William Pinniger.

X. Q. 32. To what extent did you make and sell the medicine before you left Reno, and up to December 6, 1881?

A. Besides making such sale as a retail druggist would make ordinarily to his customers, I made some sales to some of the neighboring towns; that is to say, we received some small orders from California, and from some neighboring towns in Nevada for small quantities of this preparation, and we made some small shipments to California, and also to some neighboring towns in Nevada.

X. Q. 33. Under what name did you sell the medicine at that time?

A. Under the name "Syrup of Figs" or "Fig Syrup."

X. Q. 34. To what extent did you sell the medicine?

A. To the best of my recollection, the sales, down to 1881, did not amount to more than about five hundred dollars.

X. Q. 35. Was the name of the manufacturer placed on the medicine or its labels or wrappers at that time?

A. I think it was.

X. Q. 36. Whose name was on it?

A. I think, at the start, first my name, and afterward, I think, I took in a partner, and I think the firm name was printed, and at a later date, when I came to an understanding with these parties to form a company, I think we printed the name "Fig Syrup Co." on it.

X. Q. 37. How long did you use the name "Fig Syrup Co.," prior to the incorporation of complainant?

A. I think about two years or nearly two years.

X. Q. 38. So that you first put it before the market under the name of yourself as manufacturer, and then under the name of yourself and Mr. Pinniger, and then afterward, and for two years prior to the incorporation of complainant, under the name simply of the "Fig Syrup Co." Is that correct?

A. That is my recollection, although I am not positive that Mr. Pinniger's ever appeared upon it. I remember I had some understanding with Mr. Pinniger that that was to be separate from the partnership business, the general business, and that a company would be formed, and that he could obtain an interest in that company the same as others. After I discarded my own name, I remember using the name of the "Fig Syrup Co." for a time before the incorporation of this company. But I don't remember positively whether Mr. Pinniger's name was ever printed upon the label or not.

X. Q. 39. Up to December 6, 1881, and prior to the incorporation of the complainant company, did your

labels, wrappers, or advertisements state that the basis of the medicine was senna? A. They did not.

X. Q. 40. What did they state with regard to the constituents of the medicine, if anything?

A. To the best of my knowledge no statement was published or printed as to the constituents of the preparation prior to the year 1886, excepting possibly in letters and correspondence.

X. Q. 41. What statement was there on those labels, or wrappers, or advertisements, used in connection with the medicine with regard to the presence of figs in the medicine in any form?

A. There was no statement, except that the name was used.

X. Q. 42. Was there any reference on those labels or wrappers to California figs, or anything to indicate that there were figs in it which came from California?

A. There was not; I didn't use the name, "California Fig Syrup Co.," until after the incorporation of the complainant.

X. Q. 43. I am not referring to the name of the company; I am referring to statements on the labels or wrappers, if any such were there, indicating that the medicine contained figs or the juice of figs, or any product of the figs?

A. To the best of my knowledge and recollection, there was no statement as to figs being used or as to any other substance being used in the combination.

X. Q. 44. In fact, the constituents of the medicine were not given forth to the public at all, were they?

A. Not prior to the year 1886, except through the medium of physicians and druggists and by personal statements and correspondence.

X. Q. 45. What year did you place on your labels the words, "California Liquid Fruit Remedy," that you have been referring to? A. In May, 1899.

X. Q. 46. While you were manufacturing the medicine in Nevada, what were the constituents of it?

A. I must decline to state what were the constituents of the preparation, as it would reveal a trade secret of complainant. I have no objection to stating that senna and figs were used at that time.

X. Q. 47. What else was used besides senna and figs?

Mr. OLNEY.—You need not answer that, unless you see fit.

A. I must decline to give the individual names of the articles.

X. Q. 48. (By Mr. MILLER.)—On what ground do you decline?

A. That it would reveal a trade secret of complainant, to the great injury of complainant.

X. Q. 49. Do you not claim that the defendant is manufacturing an imitation of your medicine, and have you not brought suit here for the purpose of enjoining him from doing that?

Mr. OLNEY.—We object to that question for the reason that the claims of complainant in this action appear from the bill of *complainant*, and the statement of the witness would be only his opinion and not evidence; further, the bill of complaint shows that the claim is that

they are manufacturing an article, and dressing it, and marking it in imitation of the complainant's article.

A. We do not claim that the defendant is making the same thing as the complainant.

X. Q. 50. (By Mr. MILLER.)—Was there anything in your medicine at Reno, Nevada, besides senna and figs?

A. Yes, sir.

X. Q. 51. What was it?

Mr. OLNEY.—I instruct you that you need not answer unless you see fit.

A. I must decline to answer.

X. Q. 52. (By Mr. MILLER.)—In what form did figs enter into the medicine at that time?

A. In a liquid form, the solution of the soluble substance of the fig.

X. Q. 53. Do you mean the juice of the figs?

A. It might be called the juice, perhaps, of the figs, although we used dried figs then, as now.

X. Q. 54. How did you prepare the dried figs?

A. We dissolved the soluble substance of the dried figs, and added it in the combination.

X. Q. 55. What part of the fig did you dissolve?

A. The sugar and mucilaginous substance of the fig.

X. Q. 56. Did you use the skins and the seeds?

A. We did not. That is, the skins and seeds did not enter into the remedy, as they were separated from the soluble substance, and the later alone used.

X. Q. 57. How did you dissolve the fruit?

A. We dissolved the fig substance in hot water.

X. Q. 58. You used dried figs, you say?

A. We did.

X. Q. 59. Where did you obtain the figs from?

A. At the start we bought them at Reno.

X. Q. 60. You took those dried figs and put them in hot water until they were dissolved? Is that the idea?

A. We cut them up and mascreated them, and pressed out the soluble substance in solution.

X. Q. 61. Did that produce a kind of a syrup?

A. It did produce a syrup or liquid; yes, sir.

X. Q. 62. And that liquid you put into the medicine, did you? A. We did.

X. Q. 63. In what proportions did you put it into the medicine?

A. After completing my experiments, the proportions that were adopted were, to the best of my recollections, substantially the same as at present, although we changed the proportions of some of the ingredients in 1886, and may have made since that time some slight change in the proportion of the fig substance.

X. Q. 64. What were the proportions used at Reno?

A. The proportions that we used were ten pounds of dried figs to each one hundred gallons of syrup. That is, we used that quantity, and we have used that quantity since 1886; and, to the best of my recollection, it was substantially the same prior to that time.

X. Q. 65. Now, when you had reduced those ten pounds of dried figs down to a liquid or syrup form, how much was produced thereby?

A. It would give two or three gallons of syrup or liquid to each one hundred gallons of the medicine, but there would be only about one gallon, or seven or eight

pounds—a little less than one gallon—of the fig substance.

X. Q. 66. Now, that one gallon would consist of something beside the fig itself, would it not?

A. There would be about six or seven pounds of fig substance, with sufficient water to dissolve it.

X. Q. 67. As I understand, you would take ten pounds of dried figs and dissolve them in water, would you?

A. Dissolve the soluble part, strain out the soluble part.

X. Q. 68. How much of the fig was lost in that process? In other words, how much of the fig was left in the syrupy liquid that resulted?

A. Six or seven pounds.

X. Q. 69. Then the excess of the fig that was lost did not enter into the composition at all, did it?

A. It did not.

X. Q. 70. So, then you would have six or seven pounds of the fig product in one hundred gallons of your medicine, would you? A. We would.

X. Q. 71. Before you finally came to this proportion, had you used in your experiments larger proportions of the fig?

A. Yes; in making the experiments we used the figs more freely.

X. Q. 72. In what proportion had you used the figs in your experiments?

A. We had used a number of proportions. I only remember that I used them more freely, until I came to the conclusion that it would be better to use a small quantity.

X. Q. 73. Your first idea was to use a large quantity of figs, was it? A. Yes, sir.

X. Q. 74. Was it your idea that you would get a beneficial effect in the medicine from using a large quantity of figs when you were experimenting? Was that your idea?

A. No, it was to counteract the disagreeable taste of the medicine, of the other ingredients.

X. Q. 75. Did it counteract the taste?

A. To some extent, yes.

X. Q. 76. Why did you reduce the amount of figs?

A. Because I found that the fig substance had a strong tendency to ferment; and I believed that the preparation would be less stable and uniform if I used too large a quantity of the fig substance.

X. Q. 77. Now, what effect, if any, did the fig substance have upon the medicine itself as used by you?

A. It simply helped to promote the pleasant taste in the medicine.

X. Q. 78. Isn't it a fact that it did not have any effect at all, either one way or the other, and was superfluous?

A. The fig substance was pleasant to the taste and really present in the compound, although not essential to the compound. That is, I might have used an equal quantity of honey or some other pleasant substance instead of the fig substance for the same purpose.

X. Q. 79. Then the fig does not have any effect on the compound, does it?

A. Except to promote the pleasant taste.

X. Q. 80. How does it promote the pleasant taste?

A. The addition of a mucilaginous and sugary substance tends to make a compound more agreeable to the palate.

X. Q. 81. You have other saccharine substance in there for that purpose besides figs, have you not?

A. We have.

X. Q. 82. What are they put in there for?

A. To promote the pleasant taste, to aid in preserving the remedy.

X. Q. 83. You testified in the case of the California Fig Syrup Co. against Frederick Stearns & Co., a suit brought in the Circuit Court of the United States for the Eastern District of Michigan, for the infringement of this name of yours, did you not? A. I did.

X. Q. 84. Did you state in that case that in compounding your medicine you used one hundred pounds of figs to one thousand gallons of the mixture? A. I did.

X. Q. 85. That is about the same that you are testifying to now, is it? A. It is.

X. Q. 86. And you also testified, did you not, that when it was formed, one thousand gallons of your mixture would have but one gallon of the substance of the fig?

A. I did so testify, but I underestimated the soluble part of the fig, in stating my opinion at that time. I have found since, by more careful experiments, and by consulting the authorities recognized by pharmacists of the United States, that from sixty to seventy per cent of figs are soluble, and that we may and do obtain a larger quantity than I thought at that time.

X. Q. 87. So, after all these lawsuits that you have had on this subject, you have now come to the conclusion that you placed your estimate as to the amount of the figs used, when you so testified, at too small a figure? Is that a fact?

Mr. OLNEY.—We object to that as being an incorrect statement of witness' testimony. You are now asking him about the proportion of figs in that compound, not the amount that he used.

A. I stated at that time that I used the soluble substance of one hundred pounds of figs in one thousand gallons of the medicine, but in estimating what part of the fig was soluble and what was not soluble, I underestimated the soluble part.

X. Q. 88. (By Mr. MILLER.)—In one thousand gallons of your mixture, according to your present testimony, how much of the substance from the fig would there be?

A. Sixty or seventy pounds.

X. Q. 89. You stated in your testimony in the case referred to that, in the mixture of one thousand gallons of your medicine, there would be about one gallon of this substance from the fig, but that it might possibly run up to two, but that you did not think it would amount to more than that, but possibly it might be less. Did you give that testimony?

A. I gave some testimony as to that. I don't recollect the exact words.

X. Q. 90. I will read from the record in that case a portion of your testimony as follows: "Q. Then, when you state that you use one hundred pounds of figs to one thousand gallons of the mixture, you mean, I presume, the

soluble portion produced from the one hundred pounds of figs? A. Yes, sir. Q. You don't mean to say you utilized the entire one hundred pounds? A. No, sir. We get rid of the seed, rind, and possibly some of the pulpy matter. Q. So that the mixture of one thousand gallons would have about one gallon of this substance from the fig? A. Yes, sir; I say one, it might possibly be two, but I don't think it would amount to more than that. Q. Might possibly be less than one gallon? A. Possibly, if the figs happen to be very dry and hard, and more of the seeds and less of the soluble matter than usual." Did you give that testimony?

A. Some such testimony; I don't remember the exact words. I think it is substantially what I stated at that time, and it was based on some experiments that I had made. In making that experiment, I, in some way, made a mistake as to the results, and found, or thought that I had found, that the soluble substance of the fig was in about that proportion. Subsequent experiments, however, have shown me that a larger quantity of fig substance is soluble than I then thought. And it is true now, as I stated then, that I used the soluble part of one hundred pounds of figs to one thousand gallons of syrup, and the mistake was simply in estimating as to what part was soluble, and as to what part was insoluble.

X. Q. 91. Do you know now what part of one hundred pounds of figs is soluble? A. I do.

X. Q. 92. What part?

A. From sixty to seventy per cent—sometimes a little more, sometimes a little less, depending somewhat perhaps on the nature of the figs.

X. Q. 93. Now, how many gallons of that substance would there be in one thousand gallons of your mixture?

A. That would make eight or nine gallons; say, from seven to nine gallons.

X. Q. 94. When did you find out that you had made a mistake in the testimony which you gave in this former case, and which I have just read to you?

A. I don't remember the exact time. At a later date, however, I examined the United States Dispensatory and found that it states that from sixty to seventy per cent of the substance of the fig is soluble, and I made some experiments, which satisfied me that the authorities were right, and that I was wrong on that point.

X. Q. 95. When was that? That is what I am asking.

A. I don't remember. It is since I gave that testimony, but I don't remember the year. I have made experiments at various times since then. I have made more than one experiment, and I made an experiment quite recently.

X. Q. 96. So, if I understand you correctly, you take one hundred pounds of dried figs and dissolve them as far as you can in hot water, and you add the result so obtained to make one thousand gallons of your medicine? Is that correct? A. We do.

X. Q. 97. And you think that the soluble part of the fig that is so obtained amounts to about seventy per cent?

A. Seventy per cent of the figs, seventy per cent of the one hundred pounds.

X. Q. 98. Now where do you get your authority for the statement as to the soluble part of the figs?

A. In the United States Dispensatory.

X. Q. 99. That states that it is about seventy per cent, does it? A. From sixty to seventy per cent.

X. Q. 100. And you didn't know that at the time you gave this testimony which I have been referring to, did you?

A. I presume I knew it before, but I didn't think of it at the time. I had read the Dispensatory years previous to giving that testimony.

X. Q. 101. Now, if you put no figs into your mixture at all would not your medicine still subserve its purpose and effect for which it was intended? A. It would.

X. Q. 102. Would it not have the same flavor that it now has?

A. It would have the same flavor but not quite so agreeable to the palate.

X. Q. 103. Would it not be the same color and appearance? A. Yes.

X. Q. 104. And it would have the same effect?

A. Yes, sir, it would.

X. Q. 105. And it would be just as good medicine without the figs as with them?

A. It would be just as strong medicine and as good in that sense, although the addition of a pleasant substance to the medicine makes it a little more acceptable to the palate.

X. Q. 106. Do you to pretend to say that this small quantity of figs which you use in your medicine makes the medicine more palatable to the stomach?

A. To the taste and to the palate.

X. Q. 107. Do you state that?

A. Yes, it makes it more palatable in this way: to give an illustration, if you add a few drops of cream to a cup of coffee, the cream does not improve the flavor of the coffee nor does it add to the strength of the coffee, but it softens or loosens the taste so as to make it more agreeable to the average palate.

X. Q. 108. I don't want any illustrations of other things. I am asking you a simple question and you can answer it one way or the other. Do you testify under oath that the addition of the small quantity of figs which you put in your medicine adds to the pleasant taste of the medicine?

Mr. OLNEY.—The witness has answered the question and then went on to illustrate, as he had a perfect right to do.

A. I testified that it promotes the pleasant taste of the medicine.

X. Q. 109. (By Mr. MILLER.)—What do you mean by promoting the pleasant taste of the medicine?

A. I mean that it softens the effect of the combination

X. Q. 110. Can any one detect the flavor of figs in your medicine from tasting it?

A. You can't detect the flavor of figs in the medicine from tasting it, as I don't claim that the figs give a flavor to the medicine, the flavor being derived from aromatics.

X. Q. 111. Isn't that the same thing as promoting the pleasant taste?

A. Not to my mind. The distinctive flavor of the medicine is something different from the general taste of the medicine.

X. Q. 112. Could any one from tasting your medicine determine or ascertain whether or not there were any figs entering into it as a constituent?

(Objected to as calling for the opinion of the witness about other people, and therefore as being improper testimony; or as to the capacity of other people to detect a substance in a composition by the taste, which is not an issue in the case.)

A. I would say in reply that in my opinion the general effect of a compound rightly made is more pleasant to the general or unconscious taste than a compound containing less pleasant ingredients. Although I am of opinion that the individual or conscious taste which distinguishes one substance from another cannot tell all the ingredients in the compound by tasting it.

X. Q. 113. Now, after this long speech which you have made, will you please answer the question which I asked you, and which I will request the reporter to read to you?

(X. Q. 112 read.)

A. I think he could not tell whether it was fig substance which made it pleasant to the taste.

X. Q. 114. Is it not a fact that the use of the fig in your medicine is superfluous?

A. I think that I used that term in my previous testimony, meaning that the fig substance is really present without being an essential part of the compound. I may have misused the term, but such are the facts in the case.

X. Q. 115. Did you not testify in that case as follows: "We still continue to put in the fig juice, although we regard it as superfluous, excepting that we think that a certain amount of fig juice is not objectionable, and we

wish to adhere to the original form of making it." Did you not testify to that effect?

A. I think I testified substantially to that effect, probably; misusing the term "superfluous," and with the explanation that we would regard a large quantity of fig juice as objectionable, and that we don't attach the same importance to the presence of the fig substance that we would to the presence or absence of a medicinal agent.

X. Q. 116. Was that testimony which you gave, correct?

A. It was correct so far as my intention went, although it may not have been as full and as explicit as it should have been.

X. Q. 117. But as far as it went it was correct, was it?

A. With the explanations which I have just given I would say that it is correct, that we still use figs when we might use some other pleasant substance, because we first started to use figs; and the fig substance, while it is used, is not an essential part of the compound, or what I would call an essential part of the compound. That is, not a part of the compound which gives to it its distinctive aromatic and medicinal qualities.

X. Q. 118. This testimony which I have quoted says in substance that the figs are superfluous, though not objectionable, and that you continue to put them in because you wish simply to adhere to the original form of making the medicine. Is that correct?

A. That is correct, with the explanation I have given.

X. Q. 119. Well, have you given any explanations which change the effect of that testimony, or not? Now just please answer that question.

Mr. OLNEY.—We object to that and I instruct the witness that he need not answer unless he sees fit. It is for the Court to say whether he has made an explanation or not.

A. I don't think I can answer the question any better than I have already done.

X. Q. 120. Is the presence of the figs in your medicine at this time objectionable?

A. It is not. On the contrary, fig substance promotes the pleasant taste.

X. Q. 121. Is it superfluous?

A. I think I misused the term superfluous, and I don't regard it as superfluous in what I now believe to be the correct sense of the term now.

X. Q. 122. Do you put the figs in there at the present time because you wish to adhere to the original form of making it?

A. We do, and for the reason that it promotes a pleasant taste; and if we were to leave the figs out we would have to add some other substance in place of the figs, to answer to the same purpose, and we prefer to adhere to the figs, because we used figs at the start.

X. Q. 123. I will again read you the answer which you gave to the question we have been referring to in the other case as follows: "We still continue to put in the fig juice, although we regard it as superfluous, excepting that we think a certain amount of fig juice is not objectionable, and we wish to adhere to the original form of making it." Now, when you gave that testimony was that correct, and is it correct now?

A. My meaning was then correct, as I have explained it, and I still regard it as correct.

X. Q. 124. Do you want to change that testimony now in any way?

A. I wish to state that the meaning which I intended to convey was this, that the distinctive aromatic and medicinal qualities of the compound do not come from figs; that some other substance, pleasant substance, might be used in place of the figs to answer the same purpose, but that figs now are used and have been used from the beginning for the purpose, and if we added some other pleasant substance in place of the figs it would not change the character and effect of the compound, but that it would be necessary to add some other pleasant substance in place of the figs if we omitted the figs, in order to make the compound fully as pleasant to the taste as it is at the present time.

X. Q. 125. Now, Mr. Queen, isn't it a fact and don't everybody know it and recognize it as a fact, that the infinitesimal quantity of figs that you place in your medicine has no effect either one way or the other, and that you merely put them in there so that you could be able to say with truth that figs do enter into the composition of your medicine? Isn't that a fact?

A. It is not a fact, and I don't consider that a little less than one per cent is an infinitesimal quantity.

X. Q. 126. Well, we wont haggle on terms. I will withdraw the expression "infinitesimal" and then ask the question in another form. Isn't it a fact and doesn't everybody else know it to be a fact that the small quantity of figs which you place in your compound, has no ef-

fect either one way or the other, good, bad or indifferent, and that you continue to put it in there simply that you may be able to say with truth that figs do enter into the compound?

A. That is not a fact. We use several kinds of flavoring, some pleasant substances, in making our compound. It is a well known natural fact that a pleasant substance pleases the palate.

Mr. OLNEY.—Answer yes or no wherever you can. You have answered it no.

X. Q. 127. (By Mr. MILLER.)—Now, in order to test that question and your reliability as a witness, I will ask you to tell me what are the constituents at present of your medicine, so that I can see whether these figs promote the pleasant taste.

Mr. OLNEY.—I instruct the witness that he need not answer if by so doing he would be revealing the secret formula of complainant's preparation.

A. I can't answer the question without revealing the secret formula of complainant's preparation and violating the confidence which complainant has reposed in me.

X. Q. 128. (By Mr. MILLER.)—I didn't ask you for the secret formula; I asked you for the constituents of your medicine, and which you claim to the public are well known and which you say you have advertised at large. Now, what are the constituents of your medicine?

Mr. OLNEY.—I give the same instructions.

X. Q. 129. (By Mr. MILLER.)—Do you decline to answer the question?

A. I do decline to answer the question. If I may, I will state that the question is not correct in this respect,

that we do not state that we have advertised the names of all of the ingredients used.

X. Q. 130. Then it is a secret formula that you have, is it? A. It is.

X. Q. 131. You don't publish it to the world?

A. We publish the active ingredients, the active principles, not the name of all the ingredients.

X. Q. 132. The only ingredient you publish is senna, is it not?

A. We have stated that we combine the laxative principle of senna with aromatic carminatives, sugar and water.

X. Q. 133. Is the fig an aromatic carminative, as you call it? A. No, it is not.

X. Q. 134. Now those aromatic carminatives, as you call them, are put in for the purpose of giving the pleasant taste, are they not?

A. They are, and also for the medicinal effect.

X. Q. 135. Now what are those aromatic carminatives that you put in?

A. I must to decline to answer, as it would reveal a trade secret, to the great injury of complainant.

X. Q. 136. Would it be a great injury to the public to know what they are composed of?

A. It would be a great injury to the complainant to publish the names of all the ingredients we use.

X. Q. 137. Then your medicine is a quack medicine, inasmuch as it is prepared by a secret formula which you do not make public, is it?

A. It is not a quack medicine. We give all that the medical profession requires us to give in our advertise-

ments in the medical journals, and it is recognized by standard medical authorities and physicians generally throughout the United States as a legitimate and ethical remedy.

X. Q. 138. Before you published the fact that senna was the principal ingredient everybody knew that fact as well as you did, didn't they? A. No, they did not.

X. Q. 139. Physicians knew it, didn't they?

A. Only those to whom we made the statement.

X. Q. 140. Anybody that knew anything about a laxative knew it, did they not?

A. No, certainly not. They might have supposed it would be rhubarb or butternut or some other laxative.

X. Q. 141. Now a quack medicine is one that is manufactured by a secret formula, is it not?

A. It is not. It is a remedy which falsely claims to sure diseases which it does not cure.

X. Q. 142. That is your definition of a quack remedy, is it? A. It is.

X. Q. 143. Is there anything in the composition of your medicine that you are afraid to make public or that you are ashamed of?

A. There is not. There is nothing in the medicine but what would be a credit to complainant to publish to the world, but that other chemists would then manufacture or attempt to manufacture it, and take advantage of the knowledge thus given, to the injury of complainant.

Mr. MILLER.—In view of the refusal of the witness to answer a question which is absolutely necessary for the preparation of the defendants in this case, I now notify counsel that I shall report the matter to the Court and

shall ask that the suit be dismissed on the ground that the complainant refuses to submit himself to legitimate and proper cross-examination which is necessary and which has apparently been made necessary by the witness himself. In the meanwhile I shall examine the witness on another branch of the case.

X. Q. 144. What was the largest proportion of figs ever used by you in your experiments at Reno, Nevada, prior to the time that you settled down upon your final formula?

A. I don't remember. I think it was considerably larger than used at present.

X. Q. 145. What do you mean by considerably larger?

A. Say, possibly four or five times as much.

X. Q. 146. What induced you to experiment with the larger quantity?

A. I liked the taste of figs and I wished to use the substance of the fig to counteract the unpleasant taste of the ingredients, of some of the ingredients which I was using, while making the experiments.

X. Q. 147. Because you liked the taste of figs personally did you think that was going to make a good medicine by using it? Was that your idea in using figs?

A. That it would be pleasant to the taste of other people because it was pleasant to me; yes, sir.

X. Q. 148. And you thought that therefore you would use a large quantity of figs in it, did you? A. Yes.

X. Q. 149. You found out that you were sadly mistaken in that?

A. No, I did not. I found that fig substance does not keep for a long time, that it tends to ferment.

X. Q. 150. Did you know of the popular impression at that time that figs contained laxative properties?

A. I knew at that time that figs were eaten in large quantities in order to obtain a laxative action.

X. Q. 151. Was it not on account of that popular impression that you began to experiment with figs in this way?

A. It was not, because I knew that the soluble part of figs would not have such an action; I used figs because I wished something that was pleasant to the taste.

X. Q. 152. In the former case that has been referred to, did you not testify as follows: "At the time I first got up the combination I was impressed with the idea that I wished to make it pleasant to the taste, and I was trying to think of how many pleasant things I could put into it, and I put in some figs and before I concluded my experiments I concluded that I would have to make a remedy that would give satisfaction regardless of the quantity of figs used, and knowing that the figs had no medicinal virtue in medicinal doses, and intending that the laxative should act in doses of from one-half to one tablespoon, I came to the conclusion that the figs were superfluous; but as I had started in to make it that way, I continued to put in figs." Did you give that testimony in that case?

A. To the best of my recollection I gave substantially the testimony, and as I have explained before, I probably misused the term "superfluous," and I would also state in that connection that that was the reason that I used a smaller quantity of figs, because I wished a medicine which would be uniform in operation and stable and

permanent, which would not sour when bottled and sold to the trade. Therefore, I used a smaller quantity of figs than I had used in making the experiments.

X. Q. 153. If it be a fact that the figs are superfluous and that honey or any other saccharine matter would accomplish the same purpose as the figs in your composition, and if it be a further fact that the medicinal qualities of your medicine were attributable to some other ingredients in it, and not to the figs, why is it that you selected the name "Syrup of Figs," which on its face carries the idea to the public at large that figs enter substantially into the combination?

A. I desired to give the preparation a new and original name, and I was satisfied in my own mind that the name "Syrup of Figs" would not deceive the public, because figs are so well and generally known and freely used as a food, that I thought it would be impossible to make the public think that the fig substance was the active ingredient of the preparation, and it was not to my interest to have the public think that it was simply a syrup of figs made from figs, because then every family could make its own syrup of figs, and I had no desire or intention of attempting to deceive the public, and no interest in doing so.

X. Q. 154. By using that name did you intend to have the public understand that fig juice or fig syrup entered into the combination?

A. I probably thought; without being able to recollect the exact thought at the present time, I probably thought that the public would think that some figs were used in making the preparation.

X. Q. 155. From the use of the expression "Syrup of Figs" would not an ordinary individual who had no technical knowledge of pharmacy, naturally conclude that the substance was the juice of the fig or fig syrup, or prepared from the fig? Is not that the natural and ordinary meaning of the words?

A. It was my opinion, and subsequent investigation has confirmed my belief, that the public would not regard the figs as the active ingredient of the preparation, although they might think that figs were used in making it, that the fig substance formed a part of the combination.

X. Q. 156. If I hand you a bottle labeled "Syrup of Aconite" would you not conclude that it was a syrup made from aconite?

A. I would conclude that the aconite was the active principle of such a syrup, because aconite is a well known medicinal agent.

X. Q. 157. Now, if a bottle were handed an ordinary individual labeled "Syrup of Figs," would he not on the same principle conclude that the figs were an active constituent of it?

A. I think not, because figs are even better known as a food which may be eaten freely, than aconite is known as a medicinal agent.

X. Q. 158. If a bottle were labeled "Syrup of Prunes," would not an ordinary individual who has no technical knowledge of pharmacy naturally conclude that the active ingredient was prunes in some form?

A. I think not.

X. Q. 159. What would he conclude was the active ingredient?

A. If it was sold as a medicine he would conclude that there was some medicinal agent used. If it was sold as a confection he would probably think that the flavoring principle was obtained from prunes, but that it had no medicinal action.

X. Q. 160. If you go into a drugstore and ask for a glass of soda water and see a bottle there labeled "Strawberry Syrup," and you wanted that kind, would you not naturally conclude that the main ingredient there was strawberry, in some form?

A. I would conclude that the flavoring principle was strawberry in some form, although I would not conclude that it had what I would call an active ingredient, if you mean by an active ingredient a medicinal effect.

X. Q. 161. Do you undertake to say on your oath that in your opinion, when a bottle of syrup of figs is exhibited to an ordinary individual who has no knowledge of pharmacy, that he does not at once suppose that the active ingredient of that medicine is the juice or syrup of figs or a product of figs in some form?

A. That is my opinion, and an extensive contact with the public has confirmed that opinion. The statements of many individuals that I have met have confirmed the opinion that people would think it was a medicinal compound and not simply a syrup made from figs.

X. Q. 162. Why did you, in getting up your labels, put upon them these pictures of young ladies gathering figs, and also the picture of a branch of a figtree containing figs? What was your idea in getting up that?

A. To draw the attention in order that people would read the advertisements.

X. Q. 163. Why did you think that the fig would attract more attention than anything else?

A. It was simply a fancy of the artist who got up the pictures.

X. Q. 164. Did you not instruct him to make that picture yourself?

A. Yes, he showed me some sketch and I instructed him to make it.

X. Q. 165. Then why did you say it was a fancy of the artist that put those pictures on that box?

A. Because I told the artist to get me up a design for a box, a paper box. I told him to make it an ornamental design, and I didn't draw out the design myself and didn't tell him the details of it. I left it to his fancy and judgment and he showed me the design and I kept it.

X. Q. 166. Did he suggest the fig as a design or did you suggest it?

A. To the best of my knowledge I suggested that the ornaments consist of fruit and flowers. I observed afterwards that he had introduced upon the design some pictures of a calla lily as well as the picture of a fig branch, and I liked the design and accepted it.

X. Q. 167. You took out the calla lily, did you?

A. No, sir; I left it there.

X. Q. 168. Is it in your design now? A. It is.

X. Q. 169. Do you mean to tell me, Mr. Queen, and do you expect me to believe that when you got up this label of yours, that you went to an artist and simply told him to get you up a suitable design, and that he got up a de-

sign consisting of a fig or a branch of a figtree with the fruit on it and all these young ladies gathering figs, without your suggesting to him that you wanted something of that kind? In other words, was it the idea of the artist to use the representation of a figtree or was it your idea?

A. Your question requires explanation, as we didn't use the picture of the lady and the fig branch at the time that the original design was gotten up by the artist. I had some conversation with an artist upon the subject. His name was T. F. Laycock, at Reno, Nevada. I asked him to get me up a design, an ornamental design, for a proprietary remedy. In the course of this conversation, to the best of my recollection, I suggested that the ornaments consist of a fig branch or fruit, and also of flowers, and he went off and selected the fig branch and arranged the details and showed them to me before I accepted the design. I had previously had the same artist get up other designs for me, of a floral ornament; and while I became responsible for the use of the fig branch by accepting it, and may have suggested the use of the fig branch in some shape, yet I didn't draw up the design myself or tell him just how to arrange it in detail.

X. Q. 170. That I can well understand, but is it not a fact that you suggested to him the use of the fig branch?

A. I think possibly I did.

X. Q. 171. Don't you know that you did without any "perhaps" about it?

A. I don't remember positively whether I said a fig branch or a fruit branch. I remember suggesting that he get me up a design consisting of flowers and fruits or

figs, as ornaments, and I accepted the responsibility of the design after the artist had executed it, by using it.

X. Q. 172. Did you tell the artist what medicine you were going to apply the design to?

A. I may have told him the use to which the medicine was to be put. I don't think I stated to him the nature or composition or anything on that subject.

X. Q. 173. You told him that you wanted a design for a laxative medicine, did you?

A. I probably did, although I don't remember the exact words used at the time.

X. Q. 174. So it comes down to this after all, that wanting a design for that medicine, you employed an artist to draw up one, and you suggested to him that you would like to have a fig branch amongst other things, and he went off and drew up a design of a fig branch. Isn't that about the way of it? A. That is about it.

X. Q. 175. Now, why was it that you selected the fig branch instead of any other fruit? What induced you to give preference to the fig branch?

A. I wished some kind of an ornamental design, and I had used the name "Syrup of Figs," and probably thought that figs—I don't know that I said a fig branch; I probably suggested that some display of figs and flowers would make an attractive design and distinguish it from other preparations, other designs then on the market, and arrived at an understanding with him that he would draw up an artistic design to be used as the wrapper of a proprietary medicine.

X. Q. 176. Would not a design of an apple branch

with apples on it be just as attractive and artistic as this branch of figs with figs on it? A. I think it would.

X. Q. 177. Then why did you give the preference to figs?

A. I don't know that I gave the preference to figs at all, until after the artist had presented his design. I remember that the idea of using the branch as he used it was not original with myself, that I was uncertain in my own mind as to whether to use a basket of fruit or a tree or a branch, and I left the details to the artist. And the only way was to make something that was attractive, and when he presented the design I thought it was satisfactory, and accepted it.

X. Q. 178. The branch of a figtree with figs on it had been used as a design for laxative medicines prior to that time, had it not? A. The design of a single branch.

X. Q. 179. I mean a design substantially like the design represented on the face of your label, consisting of a branch of a figtree with a representation of figs upon it?

A. I have never seen such a design on any other proprietary medicine, to the best of my knowledge and belief.

X. Q. 180. You have seen it since then, have you not?

A. Only on the imitations, what I consider the imitations of our remedy.

X. Q. 181. You have seen it on bottles, have you not, since then, that were used long prior to the time that you got up your medicine in Nevada?

A. I have never, to the best of my knowledge and belief, seen any similar design. I saw one design of a tree and perhaps a mine with a pick or something of that kind —a landscape scene. But that design was not, as far as

I know, a close facsimile or representation of the design that I have used.

X. Q. 182. When did you get up the design consisting of the figtree and the young lady holding a fig branch in her hand and picking figs therefrom, which appears on your label?

A. I think it was in about 1890. It may have been a year or so before or a year or so later, but I think it was about 1890.

X. Q. 183. And when did you get up the other design consisting of a fig branch alone, which appears on the face of the label?

A. In 1882, I believe it was, or 1883; I think it was in 1882.

X. Q. 184. When you got up this second design how did you come to select a representation of this figtree or fig branch?

A. Mr. Clay, who represented a lithographic establishment at Cincinnati, Ohio, came to me with a picture and solicited permission to make for us some posters, and stated that he thought that this picture of the woman in a similar position would make an attractive design for a poster, and that, among other things, she might hold in her hand a fig branch; and I placed an order with him for these posters, and that order was executed. And afterward I commenced to use the picture for other purposes and placed it on top of this package in 1896—July, 1896, and on the bottom of the package.

X. Q. 185. You had used prior to that time the representation of a lady holding a fig branch, had you not?

A. I don't remember of using such a design prior to that time.

X. Q. 186. When did you first commence to use the picture of the woman holding a fig branch in any form?

A. To the best of my recollection it was possibly 1888 or 1889. It may have been 1890, but don't think it was earlier than 1888.

X. Q. 187. Is it not a fact that these designs consisting of a fig branch with figs on it, and of a young lady holding a fig branch in her hand and gathering figs therefrom, were adopted for the purpose of carrying out the impression to the public at large that figs entered into the composition of this medicine, and that its laxative principles were due to the presence of figs therein?

A. It was not. We got up these designs to attract attention while people would read what we had to say to them on the subject. And we had used other designs on which fig branches did not appear at all. For example, at one time we used a picture of a woman apparently in the act of taking a dose of medicine from a small glass, and in the rear were some palm leaves and so forth, which was one of the advertisements that we had used extensively to attract attention; no fig branch appeared in that case at all.

X. Q. 188. When did you discontinue using that?

A. I don't think we have used that design for a couple of years.

X. Q. 189. But in place thereof you have been using a picture of a lady holding a fig branch in her hand?

A. We used this previously and since then. That was gotten up for us by some artist, I think four of five years

ago, and we used it up to a year or two, then changed back to this old picture of the fig branch, and have had other pictures and designs which we have used from time to time.

X. Q. 190. You use on your advertisements on walls and fences throughout the country, a picture of a woman holding a fig branch, do you not?

A. We have very extensively.

X. Q. 191. Now do not those pictures generally carry the impression to the mind of an ordinary individual that the laxative properties of your medicine are due in some way to the presence of figs therein?

A. That is a question calling for an opinion, and my opinion is that people may think that some figs are used in the preparation, but for the reason that figs are so freely used as a food, I don't think that the people generally will believe, by reason of any fig branches that we may use, that the active ingredients are obtained from figs. Now I don't know but what a good many people would take it for a pear, a picture of a pear, as readily as they would take it for a picture of a fig.

X. Q. Did you select it for the purpose of having them take it for the picture of a pear? A. No, I did not.

X. Q. 193. You wanted them to take it for the picture of a fig, did you?

A. I didn't care how they took it. I told the artist that he could use a fig branch, and he did so.

X. Q. 194. Your design was gotten up so that the public would take if to be the representation of figs. Is not that the fact?

A. Well, I suppose it is a fair inference.

X. Q. 195. Now, why did you want them to take it for the representation of a fig in preference to any other fruit?

A. I wished to attract attention. Our posters consisting exclusively or reading matter, it would probably be read by very few if their attention was not attracted to it in some form. I think that a picture draws attention, and then their statements as to the properties of the article and the name of the manufacturer will be read by all the people.

X. Q. 196. Then the only reason you can give for selecting the fig as a representative of your medicine is that you wished to attract attention? Was that your idea?

X. Q. 197. Now, why did you think that the fig would attract attention any more than any other fruit?

A. We didn't think that the fig would attract attention any more than any other fruit. I thought that a woman holding a branch in her hand would attract just as much attention as a woman having hold of a figtree or a fig branch. But some one suggested, possibly I suggested myself, the fig branch; and, having seen an original painting of some artist, of a woman in that position, holding something in her hand—it may have been a musical instrument or something else—and I remember suggesting to the artist or his suggesting to me, that she hold a fig branch in place of the musical instrument, or whatever it may have been, that the woman had in her hand. Of course, whether I suggested it to the artist or whether the artist suggested it to me, I became responsible for the use of the fig branch. It happened just in that way, that the artist or myself suggested using a fig branch, and the pic-

ture of a woman, as a picture that would attract the attention of people.

X. Q. 198. Then when you used this design you don't intend or desire that the public should obtain the impression that the medicine on which it was placed was truly a syrup of figs, or that figs give it its laxative properties. Is that a fact?

A. Yes. It was not our intention to deceive the public in that respect at all.

X. Q. 199. That would be deceiving the public, would it not?

A. To state that the figs were the active ingredient or principle, or that the active principles of the preparation were derived from figs, would be to deceive the public.

X. Q. 200. The expression "Syrup of Figs" is not descriptive then of your medicine? A. No, it is not.

X. Q. 201. Is it prevented from being descriptive by reason of the fact that in no true sense it could be called a syrup of figs or fig syrup? Is that the reason why you think it is not descriptive?

A. No, it is not, for the reason that even if it contained fifty or seventy-five per cent of fig substance, still the name would not be descriptive; because the fig substance would not give character or effect to the medicinal compound. It is not a question of proportion.

X. Q. 202. In other words, it matters not how great a proportion of figs is in it, that would not make it descriptive, is it? That is the idea?

A. Not unless it were wholly made from figs. If it were one hundred per cent figs, then what medicinal char-

acter there would be would necessarily be derived from the figs, in that event, which is not in accordance with the facts.

X. Q. 203. In your former case were not the following questions asked you, namely: "You stated in your direct examination that this expression, 'Syrup of Figs,' or 'Fig Syrup,' was not descriptive of the article, I believe—is that correct? A. Yes, sir.

Q. Was that answer based upon the fact that there is such a small proportion of the article fig that it could in no true sense be said that the article was a syrup made from figs?

A. It was principally based upon the fact that the remedy is manufactured and advertised and sold as a medicinal laxative compound, and because the medicinal virtues of the preparation do not depend on the figs used in the combination, and possibly your statement was partially the reason or one of the reasons, although I think it a minor reason, as to why I state that the name is not descriptive; and I wish to be understood now as stating that the name would be a misnomer if used in a descriptive sense, as the preparation is not a syrup produced from figs, but has a very small portion of figs in the combination."

A. I gave substantially some such statement, I think, to the best of my recollection.

X. Q. 204. Would the name be a misnomer if used in a descriptive sense?

A. It would be a misnomer if applied to a medicinal compound in a descriptive sense.

X. Q.205. And that would be a misnomer, would it not, because the preparation is not a syrup produced from figs? Is not that a fact?

A. Because the figs do not give character and effect to the preparation.

X. Q. 206. Is your medicine a syrup produced from figs?

A. Only in part, and that part is not the part which gives character and effect to the compound.

X. Q. 207. You stated in the answer which I have just read to you of your former testimony that your medicine is not a syrup produced from figs. Is that correct?

A. Yes, sir; in the sense of not being produced wholly from figs.

X. Q. 208. And therefore to use the term syrup of figs in a descriptive sense under such a situation as that, would be a misnomer, would it?

A. Yes, sir; it would be a misnomer, to use it in a descriptive sense.

X. Q. 209. Now in view of this fact, if the public at large or people who do not have a scientific knowledge of pharmacy, believe when they see this name syrup of figs on your bottles whenever they purchase it, that they are purchasing a syrup made from figs, then they are being deceived, are they not, when they believe that?

A. I don't think that they believe that the fig substance is the active principle.

X. Q. 210. I didn't ask you that question. I must request you to answer questions as I give them.

(X. Q. 209. Read.)

A. We don't believe theey are being deceived by any

act of complainant in this case. If a person knows anything as to the qualities of figs and is in the habit of eating them as a food, in my opinion, he would not be deceived, and if he does not know anything about figs, he would not necessarily come to the conclusion that the compound was prepared wholly from figs, and if he had an erroneous opinion on the subject, why of course he would be in error.

X. Q. 211. Can you answer the question yes or no?

A. If in error upon the point he would be in error, I presume. That is my understanding of a correct answer.

X. Q. 212. Well, I stated the conditions in a very plain manner, it seems to me, and I am entitled to an answer either yes or no, if you can give it. Now I will ask you in the first place can you give an answer yes or no to the question?

A. I don't think I could give an answer to the question which would be simply yes or no, which would be in conformity with the general facts in the case and the general knowledge of the public on the subject.

X. Q. 213. I will then put the question in another form. A person desires a laxative medicine and he goes into a drugstore and asks for a laxative medicine, and the druggist hands him down a bottle of your syrup of figs, and this person has never seen nor heard of the same up to that time. Now if he buys that medicine under the supposition that it is a syrup composed or made from figs, then he is being deceived, as a matter of fact, is he not?

A. I don't think so. I think that he would be simply in ignorance of the facts. I don't think that any actual deception exists unless the complainant or one of his

agents or some druggist should make a false statement to him on the subject. Being in ignorance of the point and being deceived on the point appear to me to be different things.

X. Q. 214. If you are squeamish about the use of words, then I will put it in another form. Would not the purchaser be misled?

A. He would be misled by false statements if false statements were made to him, perhaps, but if no statements were made to him he would be simply in ignorance of the facts, if he knew nothing about them.

X. Q.215. When he bought this laxative medicine, labeled with the words "Syrup of Figs" and he knew nothing of his own knowledge about the actual constituents of it, if in buying it he was under the impression that it was a syrup made from figs, then as a matter of fact he would be mistaken and misled, would he not, in view of the fact that it is not a syrup made from figs?

A. If he thought it was a syrup made from figs then he would be mistaken.

X. Q. 216. (By Mr. ROWE.)—You stated, did you not, that when you first selected the name "Syrup of Figs," that in looking for a name descriptive of your preparation you chose that not for the reason that there was a prevalent and popular impression that figs were a laxative, that you might profit by that popular impression; you didn't select it for that reason, you stated?

A. I did not. I did not, and moreover, I was not endeavoring to select a descriptive name. You asked me the question if I stated that I was trying to select a descriptive name. I sought to avoid a descriptive name.

X. Q. 217. Now, I ask you if you selected the word "Syrup of Figs" because you were aware of the prevalence of the popular impression as to the laxative quality of figs and in order to profit upon that popular impression, you chose the word "Syrup of Figs?"

A. I did not.

X. Q. 218. Did you ever know Dr. Bishop?

A. I did.

X. Q. 219. Did he reside in Reno at the time that you first prepared this medicine? A. He did.

X. Q. 220. Did you ever consult with him in regard to the selection and choice of a name descriptive of your medicine?

A. I did not. I stated the facts to him after I had decided to give the name to the article. I stated what name I had given to it and what the active ingredients of the preparation were.

(At the hour of 12:30 P. M. a recess was made until 2 P. M., at which time the cross-examination of R. C. Queen was resumed as follows:)

(By Mr. MILLER.)

X. Q. 221. In the case of the California Syrup of Fig Co. against Frederick Stearns & Co., in the Circuit Court for Michigan, heretofore referred to, were you not asked this question of cross-examination, as appears from page 112 of the printed transcript of record: "Q. Now, as for all this talk and these long explanations, I will ask you the point-blank question: Is it not a fact that your sole reason for selecting the name 'Syrup of Figs' or 'Fig Syrup' was because there was a popular impression

among people generally that figs contain laxative properties, and this being a laxative medicine, it was your desire to give them the impression that this medicine contained some product of figs, and therefore had the laxative qualities of figs, and that you were thereby endeavoring to take advantage of this popular opinion—is that a fact or is it not—you can answer the question either one way or the other, it seems to me, without any long explanation" ? And didn't you answer that question as follows: "I don't think that is wholly the case; I do think that one of the reasons that may have influenced me in giving it the name 'Syrup of Figs' was the idea that it would not convey any wrong meaning to the minds of the people; if I had thought of the name 'Syrup of Green Persimmons,' for instance, I might have thought that the people would think it unpleasant to the taste, or that they would not so readily understand that I was advertising a laxative remedy." And were you not immediately afterward asked the following qeustion: "You have stated that the reason proposed in my last question was not wholly the reason; I will ask you whether it was partially, or entered into your reason for selecting the name of 'Syrup of Figs' or 'Fig Syrup' in this connection"? And did you not answer as follows: "I think that part of the statement as you made it may partially have influenced me in giving it the name; in other words, I remember I thought that the people would more readily understand that this remedy was a laxative remedy if given a name including the word figs, which people generally regarded as a laxative kind of food. I am stating and giving my answer to the best of my recollection as the question pre-

sented itself to me at the time I named the medicine, and some of the thoughts come back to me quite distinctly, but I don't pretend to recall each and every thought upon the subject, or exactly in the order in which they occurred, but my recollection of the thoughts that occurred at the time is sufficiently distinct to make me know that my answers and statements are substantially correct." Was not that testimony given by you in the case referred as, as I read it?

A. I think that such questions were put and answered at that time in the language quoted from the book. To the best of my recollection I did give such answers, believing that the name was an appropriate one perhaps for a laxative medicine by reason of the fact that figs are used and used freely and generally as a food which has a laxative action, when taken in large quantities, and therefore I was satisfied in my own mind that while the name might be suggestive, yet that it would not be deceptive.

X. Q. 222. Is not your position and contention in this matter about as follows: that the words "Fig Syrup" or "Syrup of Figs" are not descriptive of the article itself, but that they constitute a mere fanciful name, for the reason that there is such a small percentage of figs in the article that it could not truthfully be denominated properly "Syrup of Figs" or "Fig Syrup," or syrup made from figs? Is not that about your position in this matter?

A. It is not. My position is this: that figs are not a medicinal agent, and therefore they do not give character and effect to this medicinal compound, and would not

give character and effect to the compound even if used in large quantities.

X. Q. 223. Were you not asked the following questions and did you not give the following answer in the case of the California Fig Syrup Co. against Frederick Stearns & Co., as appears by page 137 of the printed transcript of the record, namely: "Let me see if I understand your position correctly from the testimony you have given; is not your position this: that the words 'Fig Syrup' or 'Syrup of Figs' are not descriptive of the article itself, but that they constitute a mere fanciful name, for the reason that there is such a small percentage of figs in the article that it could not truthfully be denominated properly 'Syrup of Figs' or 'Fig Syrup' or syrup made from figs.

A. Your statement is largely correct, but I wish to say that I don't consider that the proportion of figs in the combination makes any great difference one way or the other; I think it is a fanciful name because it is manufactured and sold as a medicinal laxative compound to be taken in small doses of from one-half to one tablespoon to act on the liver, kidneys and bowels, and because figs have not the power to impart to the medicine its medicinal virtues; if the proportion of figs were to the whole as one to ten thousand, yet the medicinal virtues of the preparation were given to it by the figs—in other words, if figs were as powerful in their action, or if they had the medicinal nature of strychnine, for instance, a very small proportion of figs would serve to give to the preparation its medicinal effect; but as the juice of figs is laxative only in a general way, and only to a certain extent, and

must be taken in large quantities to have even a laxative tendency, of perhaps a quart or more, like the fresh juice of a great many other fruits, I consider that it does not give to the preparation containing other and more powerful ingredients its medicinal virtues, and that therefore the name is fanciful and not descriptive." Did you give that testimony?

A. I did, to the best of my recollection.

X. Q. 224. According to these articles of incorporation which you have put in evidence here, this corporation appears to have been incorporated on December 3, 1881, with Richard E. Queen, James H. Kincaid, George Alt, Simeon Bishop, and Thos. E. Hayden as incorporators, I believe? A. They were the incorporators.

X. Q. 225. What did Mr. George Aalt have to do with the business?

A. He was one of the parties who had agreed with me to form the company.

X. Q. 226. Was he connected with you in the business prior to the formation of the company?

A. Well, I think he was. Yes, he was.

X. Q. 227. Where was your factory situated at that time?

A. At the time of the incorporation, at Reno, Nevada, Virginia street, at my drugstore.

X. Q. 228. Did Alt see the manufacture at that time?

A. After the incorporation of the company he did.

X. Q. 229. Did the company continue to make the medicine at the old place after the incorporation?

A. For a period of from December, 1881, down to the latter part of October, 1883, the medicine was not manu-

factured at the old place, but was manufactured by Mr. Alt.

X. Q. 230. Where was it manufactured during that time?

A. It was manufactured at or near his place, at his place, I think, a couple of miles out from Reno.

X. Q. 231. Was the manufactory at that time situated at or near Glendale, in the State of Nevada?

A. It was.

X. Q. 232. And Mr. Alt was then manufacturing the medicine at that place, I understand, was he?

A. Yes, after the incorporation down to the fall of 1883.

X. Q. 233. Of course, he knew the formula for it, did he not?

A. He knew the formulas as used at that time.

X. Q. 234. Were any figs kept exposed in any of the places around the factory where they could be seen during that period of time?

A. I don't know, of my personal knowledge.

X. Q. 235. Did you not say to Mr. Alt about that time that it would be well to keep figs in sight in order that people coming into the factory would think that figs were used in the manufacture of the compound?

A. No, I didn't, not in that language nor to that effect, or with that meaning.

X. Q. 236. Do you mean by that you stated it to him with some other meaning?

A. I told Mr. Alt, instructed him, to make this preparation, told him how to use the figs and so forth, and stated to him that the figs did not give a medicinal

action to the preparation, but were used because they were pleasant to the taste, and I remember turning over to him, with some other things, a lot of figs that I had on hand, and, after instructing him how to make this preparation as made at that time, he took them to the company's factory, and he may have exposed them there; but so far as I was concerned, and so far as the other stockholders of the company were concerned, I am satisfied not with any intention of deceiving the public.

X. Q. 237. Isn't it a fact that during the time that Alt was manufacturing the medicine for the company, he has stated that no figs were used in the compound or medicine?

A. He stated in the case against the Improved Fig Syrup Co., he gave an affidavit, if I remember rightly, that he did not use any figs at that time, and I presume that he knew whether he did or not. If he did not, he did not carry out my instructions.

X. Q. 238. The figs were kept there, though, during that period of time, were they not?

A. I don't know. I don't think I went to the factory after teaching him how to make it. I don't think I went to his residence or at the place where the manufacture was going on during the whole time that he was manufacturing.

X. Q. 239. When you instructed him as to how to manufacture the medicine, didn't you tell him as a matter of fact that the figs imparted no special virtue to the medicine? A. I did.

X. Q. 240. Did you give him to understand that the

medicine could be made as well and of as good quality without the figs as with them?

A. I might have said it would be as good medicine, but I didn't state that it would be equally as pleasant without the figs as with them.

X. Q. 241. Do you testify now that the quantity of figs which you put in this medicine adds one whit to the pleasant taste of the medicine? A. I do.

X. Q. 242. Don't you know that if the figs which you put in were omitted entirely and nothing else was placed in its stead, that the medicine would have identically the same taste that it has now?

A. I do not. It would still be an effective and pleasant medicine without figs. I merely testified that it would be a good deal more pleasant—

X. Q. 243. (Interrupting).—Does not the pleasant taste in the medicine come solely from some of the other ingredients that are put in for that purpose?

A. If you mean by "taste," the flavor of the medicine, I say this: that is, I mean the distinctive taste, the flavor, comes from other substances, and not from figs.

X. Q. 244. Isn't it a fact that the quantity of figs put in the medicine is so small that it could not possibly affect the taste one way or the other? A. It is not.

X. Q. 245. If that is true, then the medicine made without those figs would taste different from the medicine made with the figs, wouldn't it?

A. In—about the same way, only a little more so, that is, it would be stronger, it would have a stronger taste.

X. Q. 246. Have you ever experimented in that line

and made the medicine without the figs to see whether there would be any difference?

A. I have made some experiments; I don't know that I have made any experiments exactly in that way.

X. Q. 247. Well, have you made any medicine without the figs in it?

A. Well, I think we have on one or two occasions.

X. Q. 248. What did you do with the medicine?

A. In the year 1891, if I remember rightly, our manufactory at Louisville was burned down and nearly all of our materials on hand were destroyed. We received some orders for the goods, and for a few days, while awaiting the arrival of a new supply of figs, to the best of my recollection, I stated to the party who was doing the actual work of manufacturing at that time, that he could use a little more sugar and make up a few lots of the medicine without any figs in, but to the best of my knowledge that has not occurred since 1891. It did occur at that time, according to my recollection, but not since then. I don't know whether I tasted it without the figs or not. I think, perhaps, for some reason or other it occurred on one or two occasions previous to that.

X. Q. 249. Did you have any complaint from your customers in regard to that medicine?

A. I didn't on that account.

X. Q. 250. Now, during what time was Mr. Simeon Bishop connected with your company—

A. He was one of the incorporators of the company, and withdrew shortly after the incorporation.

X. Q. 251. Now, shortly after the company was organized and the medicine was being manufactured up in

Reno, Nevada, didn't Mr. Bishop visit the factory there and see you and ask you substantially where were your figs, and didn't you reply to him that you didn't use figs?

A. No, I didn't. On the contrary, I showed him the figs and told him I used figs. I told him the laxative properties were obtained from senna. He took a sample of the preparation, and came back and told me that he had given it to his children to use, and it acted favorably, and he also stated to me that, of course, there was no medicinal action derived from the figs.

X. Q. 252. When did the company move its manufactory to San Francisco? A. In the fall of 1883.

X. Q. 253. And how long had it been manufacturing the medicine prior to that time in Nevada?

A. From the beginning of 1882 to the fall of 1883, a period of about twenty-one months, I think.

X. Q. 254. I notice in your articles of incorporation that you state that the amount of capital stock is one million dollars. I presume that was put in there simply in the ordinary way of forming a corporation where a nominal amount of capital stock was paid in?

A. Yes, sir.

X. Q. 255. You don't pretend that the million dollars was put in in money, do you?

A. No, sir; I do not.

X. Q. 256. Now, when did you commence manufacturing in Louisville, Kentucky?

A. In 1886, the beginning of the year 1886.

X. Q. 257. Do you know the author of this medical book which has been referred to, entitled "A Treatise on

Diseases of the Rectum," by Joseph M. Matthews, M. D.?

A. I do.

X. Q. 258. Where did you get acquainted with him?

A. In Louisville, Kentucky, about twenty-five years ago. But I don't think I have seen him for fifteen years or thereabouts.

X. Q. 259. Did you ever explain to him the composition of your medicine?

A. I didn't personally. Our eastern agent, I believe, was the one who told him about the composition of the medicine.

X. Q. 260. In this Exhibit "K," being page 10 of the advertisements of the journal entitled "Annals of Hygiene," for December, 1893, what does the picture there shown intend to represent?

A. It represents the picture of a woman holding a fig branch in her hand. Possibly she may appear to be pulling figs from the tree.

X. Q. 261. Now, prior to the publication of that advertisement, had you had advertisements in other medical journals, of your preparation? A. We had.

X. Q. 262. When did you first commence advertising in medical journals? A. In 1886 or 1887.

X. Q. 263. Were those advertisements the same as this one, which I am now referring to?

A. Not exactly the same. We didn't have that picture, and they were worded somewhat differently. They stated, however, that we used the laxative principles of senna and aromatic carminatives and sugar, water and figs.

X. Q. 264. When did you first commence advertising that you used senna in your preparation?

A. In 1886 or 1887.

X. Q. 265. In an advertisement which you had prior to this one that we are speaking of, did you make a statement that the preparation "presents in the most elegant form the laxative and nutritious juice of the figs of California"?

A. That was copied from a package, I think.

X. Q. 266. Yes, the quotation which I read is copied from your label which you formerly used, and I ask you if you had that statement in your advertisements in medical journals?

A. I don't remember of using that form of words in any medical journals.

X. Q. 267. Did you use that in advertisements in any other journals or papers?

A. Not as a general thing, although we may at times have published a cut of the front of the package, a facsimile of the front of the package on which those words appear. We may possibly have used that in some other advertisement, but not as a general or regular thing.

X. Q. 268. You had a suit over this trademark with Frederick Stearns & Co., did you not? A. We did.

X. Q. 269. In what way have you changed the label since the days of the case with Frederick Stearns?

A. The outside label?

X. Q. 270. Yes.

A. We have rewritten the lower part of the label and omitted the words, "presents in the most elegant form the

laxative and nutritious juice of the figs of California, combined with the medicinal virtues of plants."

X. Q. 271. You mean you have erased the words which you have just quoted, do you?

A. Written other statements there.

X. Q. 272. Of course, it was not a fact that the medicine did present in the most elegant form the laxative and nutritious juice of the figs of California, was it?

A. It presented a small quantity.

X. Q. 273. Why did you erase those words from the label?

A. My attorney said that the statement should be made so plain that nobody could possibly misunderstand me that the medicinal virtues were appertaining to the plants, and I endeavored to do so. I submitted the revised copy to him, and he said it was satisfactory, and I made the change.

X. Q. 274. You made that change after the decision in the case of Frederick Stearns, did you not?

A. We did.

X. Q. 275. Now, in regard to the large number of sales that you have spoken of, I will ask you about what were the sales in the year 1880, in round numbers, if you remember?

A. 1880, before the incorporation of complainant?

X. Q. 276. Yes.

A. I don't remember, but I should think not more than two hundred dollars or three hundred dollars.

X. Q. 277. About what were the sales in 1881?

A. I don't remember positively, but I should say not more than that.

X. Q. 278. About what were they the first year of the incorporation of the company?

A. 1882. I think the sales were somewhere in the neighborhood of five thousand dollars or six thousand dollars, if I remember rightly.

X. Q. 279. About what were they in 1883?

A. I think not more than three thousand dollars or four thousand dollars in 1883.

X. Q. 280. And what in 1884?

A. I don't know positively, but I should think possibly three thousand dollars or four thousand dollars or five thousand dollars.

X. Q. 281. What were they the year after that?

A. To the best of my recollection the amount in 1885 was somewhere in the neighborhood of ten thousand dollars or twelve thousand dollars.

X. Q. 282. How about 1886?

A. I think in 1886 the sales ran up over twenty thousand dollars.

X. Q. 283. How in 1887?

A. I think the sales ran up—I don't remember positively. I think the sales were forty thousand dollars or fifty thousand dollars in 1887.

X. Q. 284. How about the year after that?

A. To the best of my recollection they jumped up to nearly one hundred thousand dollars.

X. Q. 285. And in 1888?

A. I am now stating without remembering distinctly, but our increase was very large from 1886 to about 1892, the increase each year—I think somewhere in the neigh-

borhood of one hundred and sixty thousand dollars to one hundred and seventy thousand dollars, in 1888.

X. Q. 286. About what had they increased to up to the year 1892?

A. I think that they had increased during that time from fifty to one hundred per cent per annum; some years I think they doubled, and some years perhaps not quite double.

X. Q. 287. Well, say in 1893, for instance; about what was the extent of the sales?

A. I think in 1893 the sales ran up to five hundred thousand dollars or six hundred thousand dollars. The net wholesale prices.

X. Q. 288. Now, you have also spoken of the large amount spent by your company in advertising, and I notice on page twenty-five of the printed transcript of the record in the Frederick Stearns' case that you testified that about the year 1886 you were spending more than twelve thousand dollars in advertising, and in 1887 you spent more than twenty-five thousand dollars in advertising, and in 1888 you spent more than forty-five thousand dollars in advertising, and in 1889 more than one hundred thousand dollars and in the year 1890 more than one hundred thousand dollars, and in 1891 more than two hundred thousand dollars, and in 1892, at the rate at which you had been advertising from the first of the year, you would spend more than two hundred thousand dollars, and that it was safe to say that you had spent altogether in advertising more than five hundred thousand dollars up to the middle of the year 1892. I presume that is substantially correct, is it not?

A. Yes, sir; I was on the safe side of the amounts expended.

X. Q. 289. Now, you also spoke of the earnings of the company being one million dollars. By that I presume you mean that is about the figure at about the present time?

A. I said five per cent on one million dollars for some years past.

X. Q. 290. You said that the earnings were five per cent on one million dollars?

A. Yes, the net earnings were a little more than five per cent of one million dollars.

X. Q. 291. You have produced here a bottle of medicine marked Exhibit "B," attached to the bill of complaint, which you said you bought from the drugstore in this city and county, called the Hayes Street Pharmacy, I believe. Is that correct?

A. I think that is the package I bought from the Hayes Street Pharmacy. Yes, that is correct.

X. Q. 292. And you say that was about May 10, 1897, was it? A. It was.

X. Q. 293. Did you buy this medicine for use?

A. No, I simply bought it to see what he was selling.

X. Q. 294. I presume that you had heard that he was selling "Syrup of Figs," had you not, and you went in there to see?

A. Passing by his store I thought I saw some of it in a window, a show-window, if I remember rightly, and I went in to buy a bottle.

X. Q. 295. As I understand it, you simply went in and asked him for a bottle of "Syrup of Figs," did you?

A. I did.

X. Q. 296. A young man behind the counter asked you if you wanted a twenty-five cent or a thirty-five cent bottle? A. He did.

X. Q. 297. What did you say to him?

A. I said: "Let me see them."

X. Q. 298. Then did he take down and show you the two sizes of bottles?

A. He only took down one size, and, as he did so, I said: "What is the difference between them"? He answered: "Made by different companies." I said, pointing to the bottle which he had in his hand: "Who made that"? He said: "The San Diego Fig Syrup Co."

X. Q. 299. Did you ask him who made the other?

A. I did not.

X. Q. 300. Was the other your article?

A. It was.

X. Q. 301. So he had the two articles there, did he?

A. He did.

X. Q. 302. You selected this one which is marked Exhibit "D," and bought it from him, and paid him for it, and brought it away, did you? A. I did.

X. Q. 303. What did you pay him for this one?

A. Twenty-five cents.

X. Q. 304. I presume you afterward turned it over to your attorney to be used as evidence in this case, did you not? A. I did.

X. Q. 305. Did you buy it for that purpose?

A. Yes, sir.

X. Q. 306. I understand you were trying to find out the

persons who were infringing your right as contended for by you? That is a fact, is it not? A. Yes, sir.

X. Q. 307. And you bought it therefore with the intention of exhibiting it as a piece of evidence in the case to prove your assertions? Is that correct?

A. Yes, sir.

X. Q. 308. You didn't buy it for the purpose of taking it as a medicine yourself, did you? A. I did not.

X. Q. 309. Would that testimony apply to all these other bottles that you have testified to, one of which I believe is marked "Exhibit "E," and another Exhibit "G," and another Exhibit "F?" Would the same testimony apply to this also? A. It would.

X. Q. 310. You bought all three of these from different persons, did you not, different stores? A. Yes, sir.

X. Q. 311. Now, here is Exhibit "E," for instance. I believe you say you bought that on May 7, 1897, from the Fairmount Pharmacy, did you not? A. I did.

X. Q. 312. You went in there as in the other case, I presume, and asked for a bottle of "Syrup of Figs," did you? A. I did.

X. Q. 313. Did the man bring out that bottle for you then?

A. He brought out that bottle while standing behind the counter without showing it to me, and said: "I have the 'Fig Syrup Co.'" And I said: "All right; give me the bottle." So he went and wrapped it up and handed it to me, and I paid him for it.

X. Q. 314. How much did you pay him for it?

A. Twenty-five cents.

X. Q. 315. You then took that to your counsel and handed it to him, turned it over to him, for evidence in this case, did you? A. I did.

X. Q. 316. Did he show you any other fig syrup besides this? A. He did not.

X. Q. 317. Did you see any other fig syrup in the store besides this? A. I did not.

X. Q. 318. You didn't buy that with the intention of taking it yourself as medicine, did you?

A. I did not.

X. Q. 319. Now, here is Exhibit "F," which you have produced; I believe you stated that you bought that from a drugstore at the corner of Kearny and Sacramento streets, did you?

A. I did. I bought this at the drugstore at the southeast corner of Kearny and Sacramento.

X. Q. 320. Whose drugstore was that?

A. It had the name Lucius Little, proprietor, on the window, and above that appeared the sign, "Schmidt's Pharmacy."

X. Q. 321. Did you see Lucius Little?

A. I did not.

X. Q. 322. You don't know him now by sight, do you?

A. I do not.

X. Q. 323. Do you know the proprietor of those drugstores, The Fairmount Pharmacy and the Hayes Street Pharmacy? Were you acquainted with the proprietors of those drugstores? Do you know them to be the proprietors?

A. Only by the statements of the proprietors themselves and of the clerks. The clerk introduced me to Mr.

Bright as the proprietor of the store, but I didn't know the clerk any better than I did Mr. Bright.

X. Q. 324. Now, when you went in to get this Exhibit "F" at the store with the name of Lucius Little over it, I presumed you followed the same course there, and asked for a bottle of "Fig Syrup," did you? A. I did.

X. Q. 325. And the party behind the counter brought out this package and gave it to you, did he?

A. He did.

X. Q. 326. You bought it from him? A. I did.

X. Q. 327. What did you give him for it?

A. Twenty-five cents.

X. Q. 328. You turned that over to your counsel, I presumed, the same as you had done the others, did you?

A. I did.

X. Q. 329. And it was bought for the same purpose as the others, was it? A. Yes, sir.

X. Q. 330. Now, here is another one marked Exhibit "G," which you said you bought from the Ariel Pharmacy on May 11, 1897. I presume the same kind of transaction occurred with reference to that as with reference to the other that you testified to, did it? A. Yes, sir.

X. Q. 331. How much did you pay for this one?

A. Twenty-five cents.

X. Q. 332. Did you turn it over to your counsel?

A. I did.

X. Q. 333. To be used as evidence in this case?

A. I did.

X. Q. 334. Were you acquainted with the proprietor of that drugstore? A. I was not.

X. Q. 335. Are you acquainted with him now?

A. Only by his own statement.

X. Q. 336. (By Mr. ROWE.)—Mr. Queen, Mr. Alt was one of the incorporators of this complainant company?

A. He was.

X. Q. 337. Was he a druggist?

A. No, he was not.

X. Q. 338. Was he a chemist? A. No.

X. Q. 339. Did he have any technical knowledge at all of chemistry or pharmacy? A. I think not.

X. Q. 340. You entrusted to him the manufacture of this preparation, did you? A. I did, for a time.

X. Q. 341. Could anybody manufacture it without any technical knowledge of pharmacy?

A. After being taught.

X. Q. 342. You found it difficult, rather, to answer, Mr. Queen, before recess, as to whether a party going into a drugstore and buying a bottle of "Syrup of Figs," and not knowing that the active principle, the medicinal agent, was senna; would he or not be deceived, Mr. Miller asked you. You thought a man a fool who would go in and make that purchase and think that he was getting the juice of figs, a fruit syrup, and that it would be a laxative; that he could not believe it a laxative; you said that he might be mistaken, but he could not be deceived.

A. I said that it would be simply ignorance of the fact. I didn't say that he would be a fool.

X. Q. 343. I thought you said a man would be a fool who believed that? A. No.

X. Q. 344. You said that you stated to Mr. Alt that fig juice was not medicinal, did you? A. Yes.

X. Q. 345. Why did you find it necessary to impress him with that statement that the figs used in that compound were not a medicinal agent at all? Did he not know that?

A. I don't know. I was explaining to him the properties and nature of the different articles used, and the ways of using them. I told him why we used it.

X. Q. 346. Did you meet Mr. Bishop before 1881?

A. Yes; I knew him as far back as 1876 or 1877, I think.

X. Q. 347. Did you know him when you first invented the formula for this preparation? A. I did.

X. Q. 348. Did you have any conversation with him about the time you invented this formula?

A. I did.

X. Q. 349. Were any business propositions discussed between you two about that time?

A. Shortly afterward, during the year 1879.

X. Q. 350. Had you, at the time that you met Mr. Bishop and discussed this matter with him, had you then selected the name "Syrup of Figs" as a designation for your medicine? A. I had.

X. Q. 357. Did you ever at any time discuss with Mr. Bishop the advisability of continuing the use of this name, and the reasons why it would be a good name to characterize or designate your medicine?

A. I think we may have had some conversation on the subject. I didn't consult him as an adviser or as a responsible party to decide for me what to do. I may have simply told him that I was using the name in a fanciful sense, that the active ingredient was senna, that the figs

were not an active ingredient, that I was simply using it as a trade name.

X. Q. 352. You are certain, however, that you never did discuss with Mr. Bishop the fact that because there was a popular impression existing as to the laxative property of figs, that therefore the term "Fig Syrup" would be a good name to select and preserve, as it would commend itself to the public for that reason?

A. I didn't so speak to him in the sense of deceiving the public. I may have stated to him that while figs are used as a laxative food by the public, and while they are not the active ingredient of this preparation, yet I think it is a good name, pleasantly suggestive, for a medicinal compound. I don't remember the exact language of the conversation, but I know that I did not make to him any deliberate false statement.

X. Q. 353. (By Mr. MILLER.)—Speaking of the extent of your business, I will ask you where is your manufactory for manufacturing this medicine?

A. We manufacture in this city for the Pacific Coast, and manufacture at Louisville, Kentucky, for other territory east of the Rocky Mountains.

X. Q. 354. Is it a large or a small manufactory that you have here? A. Here in this place?

X. Q. 355. Yes.

A. Well, it is a pretty good-sized house. It is about fifty by one hundred and twenty feet, two stories high, and basement.

X. Q. 356. How many men do you employ in the manufactory?

A. Do you mean in the manufactory, including bottling, wrapping and labeling, and so forth?

X. Q. 357. Yes.

A. We employ from six to eight, according to the way business is; whether it is a good season or a quiet season.

X. Q. 358. How many do you employ exclusively in the manufacture of the article, without regard to bottling, labeling and handling, simply in the manufacture?

A. Two.

X. Q. 359. What are their duties generally?

A. Well, principally to manufacture.

X. Q. 360. They mix the ingredients together, do they?

A. Yes, sir.

X. Q. 361. Do they do that out at your factory here?

A. They do.

X. Q. 362. How long have they been so employed?

A. Ever since about 1886; that is, the one who has charge of it; I think he has been employed there ever since about 1886.

X. Q. 363. Which one is that you refer to now?

A. I refer to a brother of mine.

X. Q. 364. He is the one who testified, I believed, in one of these other cases, is he not?

A. I don't remember of his giving testimony in any other case?

X. Q. 365. Did he not make an affidavit in the Improved Fig Syrup case?

A. I don't remember of his doing so, although it is possible that he may have done so.

X. Q. 366. How long has he been connected with the medicine? A. My brother? Since 1886.

X. Q. 367. Who is the other man that you refer to?

A. A man named McElvany.

X. Q. 368. How long has he been connected with it?

A. He has been in our employ, I think, since about 1878, and he is now assisting my brother in the work of manufacturing; I don't remember how long, but I think two or three years, perhaps maybe a little longer.

X. Q. 369. What is his name? A. McElvany.

X. Q. 370. What is his first name?

A. John McElvany.

X. Q. 371. You are the president of the complainant corporation?

A. I am not. I am the general manager.

X. Q. 372. I presume, though, you are one of the principal owners in it? A. I am.

X. Q. 373. Do you own a majority of the stock?

A. I do.

X. Q. 374. And always since its incorporation?

A. No, not continuously since the incorporation, but I afterward bought out some of the other stockholders.

X. Q. 375. Who is the president of it?

A. Thomas E. Haydon, of Reno, Nevada.

X. Q. 376. (By Mr. ROWE.)—Do the figs used in this preparation of yours give it a distinctive taste or flavor?

A. They do not.

X. Q. 377. If you had simply the word "laxative" printed upon your package, would you, by the taste, be able to tell whether the fig entered into it at all?

A. I think not, by the taste.

X. Q. 378. You would not know that figs were employed at all in the preparation?

A. I don't believe I would, simply by the taste. That is, I would not know whether it was figs or some other syrup, just by the taste.

X. Q. 379. Isn't it a fact that the wording "Syrup of Figs" promotes the sale of the article more than the flavor of the fig juice promotes the flavor?

A. I think not. I think that if people thought it was simply a syrup made from figs, that I could not sell it at all. I think that the larger sales are due to the merits of the article and the advertising that we have given it.

Redirect Examination.

(By Mr. OLNEY.)

R. Q. 1. What are the prices at which you sell your preparation?

A. We sell it to the drug trade at four dollars per dozen, and allow wholesale druggists a discount of ten per cent on that price.

R. Q. 2. What is the retail price of your medicine?

A. The ordinary retail price, outside of some of the large cities where cutting the prices exists, it is fifty cents per bottle. In this city, where there are a number of cut-rate establishments, the price has been reduced to thirty-five cents per bottle.

R. Q. 3. Then, when this man asked you if you wanted a twenty-five or thirty-five cent bottle, what did you understand that he referred to by the thirty-five cent bottle?

A. I presumed he meant our preparation.

R. Q. 4. That is what you understood?

A. Yes, sir.

R. Q. 5. Have you made any inquiries to ascertain who the owners are of these respective pharmacies that you visited?

A. I have. I have made inquiries through the commercial agencies of the country.

R. Q. 6. And have you, upon such inquiries, found out the defendants here?

A. I was so informed, with the exception possibly of the case of Lucius Little, when I understood that his wife also claimed an interest in the business.

Recross-Examination.

(By Mr. MILLER.)

R. X. 1. Is it not a fact that thehouse of Frederick Stearns & Co. is on the market, and is selling now their compound called "Syrup of Figs"?

A. I don't know, of my own personal knowledge. I presume it is a fact, however.

R. X. 2. You brought suit against them for the purpose of preventing them from so doing, did you not?

A. Yes, sir.

R. X. 3. And you were not successful in that suit, were you? A. I was not.

Redirect Examination.

(By Mr. OLNEY.)

R. Q. 1. Do you know whether or not they have kept, continued to keep, their article in the market?

A. I think they are still selling, although I have not any personal knowledge of the fact.

(Further hearing adjourned to Friday, October 14, 1898, at 10 A. M., on which day the recross-examination of R. E. Queen was resumed, and, by request of respective counsel, is inserted in the record at this point.)

Recross-Examination.

(By Mr. MILLER.)

R. X. 1. Mr. Queen, has there been any change in your formula for making the syrup of figs since the year 1892?

A. There has not.

R. X. 2. When was the time that you made the change in your formula?

A. Early in 1886 I made a slight change in the proportions, but the composition has been the same since 1884 down to the present time.

R. X. 3. You did not change any of the ingredients? You simply changed the proportions?

A. Made a slight change in the proportion. I don't think there was any substantial change.

R. X. 4. With that exception, the formula is substantially the same now as when you finally perfected it at Reno?

A. No, I didn't perfect it until after coming to San Francisco. After coming to San Francisco I made an improvement, changes in that respect, that I added other ingredients which had not hitherto been used, and omitted some which had previously been used.

R. X. 5. Well, after arriving at that state of the formula, then the only change that you made was this slight change in the proportion that you referred to, in 1888?

A. Excepting that some improvement in the details of the process of manufacturing was made.

Wednesday, October 12, 1898, 10 A. M.

Counsel appearing:

For complainant, Warren Olney, Esq.

For respondents, John H. Miller, Esq., and Purcell Rowe, Esq.

Examination in Chief of

A. P. WOODWARD, M. D., a witness called on behalf of complainant; sworn.

(By Mr. OLNEY.)

Q. 1. What is your full name?

A. A. P. Woodward.

Q. 2. What is your business?

A. Physician. Some say physician and surgeon, but I always claim that the name physician includes that of surgeon.

Q. 3. Are you a graduate of any medical college or university?

A. The Bellevue Hospital Medical College, New York city.

Q. 4. How long have you been practicing your profession? A. Between twelve and thirteen years.

Q. 5. How long have you been in this city?

A. About nine years.

Q. 6. Do you occupy any official position in your profession in this city? A. Yes, sir.

Q. 7. What is it?

A. President of the San Francisco County Medical Society.

Q. 8. Are you acquainted with the preparation known as "Syrup of Figs" or "Fig Syrup"? A. Yes, sir.

Q. 9. I refer to the preparation put up by the California Fig Syrup Co., of which Mr. R. E. Queen is the manager.

A. Yes, I know the place very well. I think it is 330 Hayes street, or something like that.

Q. 10. You are acquainted with the preparation?

A. Yes, sir.

Q. 11. How long have you been acquainted with it?

A. I am not sure of the exact time, but I think it is at least seven or eight years.

Q. 12. Have you been informed as to the principal active ingredient of the composition? And if so, how long have you been informed what it is?

A. Well, I have always understood that the principal active ingredient in it is senna or some extract of senna.

Q. 13. How long have you had that opinion?

A. Well, perhaps nearly the whole time that I have known of the preparation, seven or eight years.

Q. 14. What can you say as to its being a beneficial or injurious composition for the human system?

A. I don't think it is injurious at all. I have known a great many patients to use it, and generally it is very efficient and very mild laxative or cathartic when taken

in not too large doses; but you will find patients that it does not agree with, the same as you will with any other cathartic medicine.

Q. 15. Have you prescribed it in your practice?

A. Yes, sir; my patients have used it; and sometimes when they have told me that they have been in the habit of using it, instead of my prescribing for them, as they are already using it, why I say, "All right; go ahead and use it."

Q. 16. Have you prescribed it before your patients have used it? That is, have you prescribed it to those who have not used it?

A. I don't think I have ever given a written prescription for it, but then I have told them to get it, just the same as I have told them to get some other medicines, Hunyadi Water or Apenta Water, at the drugstore.

Q. 17. By what name is this preparation known among physicians?

A. Well, it is generally spoken of as "Syrup of Figs." That is not the official title, but then that is the way they generally express it. I believe the exact title is the "California Fig Syrup." I don't think I know exactly what the title is.

Q. 18. "Syrup of Figs" is the name given to it by the complainant. Have you known, or do you know of any other composition on the market known by the name of "Syrup of Figs," except this preparation of complainant's?

A. I don't know of any other preparation, excepting that I saw, perhaps a year ago or something of that sort, a preparation on the market called "Syrup of Figs," or

something bearing that title, similar to that, I think, in the show-window of the drugstore at Hyde and California, and I saw at the time that it was not what I had always known as the "Syrup of Fig" manufactured by this company, down on Hayes street. I don't think I have ever heard anything about it since.

Q. 19. With that exception, you don't know of any other composition that is known by that name?

A. No.

Q. 20. In prescribing the medicine or in referring to it in conversation with your patients, what name do you give to it?

A. "Syrup of Figs" or possibly "Fig Syrup"; most likely "Syrup of Figs."

Q. 21. Do you know of a doctor, Joseph N. Matthews, by reputation? A. Yes, sir.

Q. 22. What position does he occupy at the present time?

(Objected to unless the witness states that he knows of his own knowledge what position he occupies.)

A. Well, I was not present at the society meeting when he was elected, but, of course, I take a journal, and in a general way I know it through that, the same as physicians read and know positions held by other physicians at a distance. I don't know what lawyers would say about that. I didn't see him or hear him elected at the time, of course. But I am as morally certain of it as if I had been there.

Q. 23. I ask you what position he occupies?

A. President of the American Medical Association.

Mr. MILLER.—I move to strike out the answer of the

witness on the ground that it is hearsay and not of his own knowledge; that it is utterly impossible for him to swear to evidence of that kind.

Q. 24. (By Mr. OLNEY.)—You have stated your source of knowledge, have you, doctor, that he occupies that position?

A. Yes, sir; the most reliable source is the—"Journal of the American Medical Association," is the name of it. It is published in Chicago.

Q. 25. Has that association an official organ?

A. Yes, that is the official organ.

Q. 26. That paper that you have referred to?

A. Yes, sir.

Q. 27. Do you know a book published by Dr. Matthews, entitled "Diseases of the Rectum"?

Mr. MILLER—We object to that as incompetent, irrelevant and immaterial. We have nothing to do with any medical books in this case, this being purely a question for the alleged infringement of a trademark; and we do not propose to be sidetracked into any issue as to any medical book or medical terms or things of that sort. We shall move to strike out all the testimony that shall be given by this witness concerning this medical book or any medical matters. And I make further objection that it is immaterial whether this witness knows about what the book is, as his knowledge is not in issue here.

A. Yes, sir.

Q. (By OLNEY.)—What is the standing of that publication in the medical profession?

Mr. MILLER—The same objection; and I shall move to strike out the answer of the witness just given.

A. I think the standing of the book is very good; one of the best works on diseases of the rectum; perhaps the best published in the United States.

Cross-Examination.

(By Mr. MILLER.)

X. Q. 1. Do you know this Dr. Matthews, personally?

A. No, sir; I have never met him.

X. Q. 2. Did you ever see him in your life?

A. Not that I know of.

X. Q. 3. You had no intercourse with him, had you?

A. No, sir.

X. Q. 4. Were you personally present at the occasion when he was elected president of this society that you have testified to? A. No, sir.

X. Q. 5. Your sole basis for your oath then, is what you have heard concerning him, is it?

A. My sole basis for my oath? I don't exactly understand that.

X. Q. 6. You have testified, as I understand, that he is president of this Medical Association. I now ask you if your sole basis of your oath is what you have heard and read concerning it?

A. What I have read in the official organ of the association.

X. Q. 7. Do you swear now, as a fact, on your oath, that he is the president of that association?

A. I swear that I believe it to be a fact.

X. Q. 8. Is that the extent that your testimony will go? Does it go any further than that?

A. In connection with that point.

X. Q. 9. Are you in the habit of going into Court and swearing positively to facts, when the only basis of your statement is what you have heard and read concerning matters?

A. I am not in the habit of going into Court very often, but in a case like that where the fact is continually and repeatedly published in medical journals, I think it is a fact, and I simply state it as a fact in that connection. I don't swear that it is, but I swear that I believe it is a fact.

X. Q. 10. Do you believe everything you read in the medical journals?

A. No; I don't believe everything I read in the medical journals.

X .Q. 11. You pick out those particular things that you want to believe, do you, and others that you don't care to believe you don't believe. That is about the way of it, is it? A. Not at all.

X. Q. 12. Have you any reason for believing this any further than other statements are made in that journal?

A. No more reason than for the majority of statements that are in that journal. I think they are much more reliable then ordinary newspaper reports, but I think that even medical journals might have errors in them sometimes.

X. Q. 13. Then the only thing you know about this Dr. Matthews being president of that association is that you have read the statement in that medical journal?

A. Of course, I have heard other physicians say so,

but I think the more reliable authority, perhaps, would be this journal.

X. Q. 14. And that is the basis of your statement and the only basis of it, is it?

A. That is what I claim, that the "Journal" is the only basis. I don't take what I might call hearsay evidence of physicians.

X. Q. 15. You take the evidence of the "Journal," do you?

A. Yes, sir; because it is the official organ. It is recognized as the official organ of the association.

X. Q. 16. Did you ever write a prescription for this "Syrup of Figs" for anybody?

A. I don't think I ever did.

X. Q. 17. When you give prescriptions you are in the habit of writing them, are you?

A. When I give prescriptions of course I have to write them before I give them.

X. Q. 18. That is a practice among physicians, is it not? A. Yes, sir.

X. Q. 19. Now, I understand you to say that some of your patients had been using this medicine before you attended them, and that you told them to continue. Is that so? A. Yes, sir.

X. Q. 20. That is about the extent to which you have recommended its use, is it?

A. I also stated, I think, immediately afterward, that I had sometimes told patients to go to a drugstore and get "Syrup of Figs," just the same as I have told them to get "Apenta" water or "Hunyadi" water or some other laxative medicine. Instead of writing a prescription, I

have told them sometimes to go to a drugstore and get those things.

X. Q. 21. You have been in the habit of prescribing that way for other proprietary medicines, have you?

A. Very often; like any physician, I am inclined to break over the bounds sometimes.

X. Q. 22. The only way in which you recommend it, then, is in the same way in which you recommend other standard productions, such as "Hunyadi" water, or licorice powders, or something of that kind, is it?

A. I think you might say that is the only way I recommended it; because, with some people, of course, it will agree perhaps, better than "Hunyadi" water, or "Apenta" water. You can't find any one remedy that will agree equally with everyone.

X. Q. 23. You don't always prescribe the same purgative for all your patients, do you?

A. I believe not

X. Q. 24. One purgative will agree with one and disagree with another, will it not?

A. It sometimes happens, or, at least, many times, that a patient thinks it disagrees with him when it is not the fault of the medicine.

X. Q. 25. Then this "Syrup of Figs" would be a good purgative for some people and not for others, would it?

A. That might be so.

X. Q. 26. Did you ever take any of it yourself?

A. No, sir.

X. Q. 27. Did you ever analyze it? A. No, sir.

X. Q. 28. Do you know what it is composed of?

A. No, sir; only from general reports.

X. Q. 29. What does its name indicate that it is composed of, or that it has got in it as its principal ingredient?

A. Well, perhaps one might think from the name that the principal ingredient is some preparation of figs, but I have always understood that the active ingredient is some form of senna, extract of senna.

X. Q. 30. You understand that the active ingredient of it is senna by virtue of the fact that you are a physician, do you not?

A. No, from hearsay, what I have been told. I think the first I was told by some one who was employed in the manufacture of it at Hayes street.

X. Q. 31. Have you been out to the manufactory of it there?

A. I have been in the store there in the building; yes.

X. Q. 32. What was the occasion of your going there?

A. To see two of the employés there.

X. Q. 33. Have you been acquainted with Mr. Queen for some time?

A. No, I never met Mr. Queen, I think, until yesterday evening.

X. Q. 34. You are acquainted with some of the employés out there, are you?

A. Yes, sir; I know some of them for several years.

X. Q. 35. And you went out there to see them, did you? A. Yes, sir.

X. Q. 36. Now, is it not a popular impression among people in general that figs have some kind of laxative property?

Mr. OLNEY.—We object to that as immaterial and irrelevant and not cross-examination, and will insist upon

the objection when the deposition of the witness comes to be read in Court.

A. Well, people often take figs with the idea that the skins and seeds, and so forth, have some stimulating effect upon the bowels—laxative effect—mechanical effect, you might call it.

X. Q. 37. How long have you known of such a popular impression as that?

(Objected to as incompetent, irrelevant and immaterial and not cross-examination, and as the question assumes that the witness has known of such a popular impression.)

Mr. MILLER.—I certainly assume, because the witness has already testified that he did know it as well as everybody else that he ever heard speak of it.

A. Well, I am not sure about that. Possibly for twenty years they would eat figs the same as they would eat prunes, or things of that sort, as a laxative food, you might say.

X. Q. 38. Prunes also are known as a laxative food, are they not? A. Yes, sir.

X. Q. 39. When did you see the first bottle of this medicine, labeled "Syrup of Figs"?

A. Well, I am not positive. It must have been nearly nine years ago.

X. Q. 40. Do you remember when you saw it?

A. No, here in San Francisco somewhere.

X. Q. 41. Did you know anything about it before you saw it, on that occasion?

A. I think I might have heard of it, but I would not swear to it.

X. Q. 42. You didn't know what the ingredients were, did you?

A. Perhaps not at that time; I don't remember exactly. In fact, I never heard, of course, of all the ingredients in it, but, as I say, I have always understood the active ingredients is some preparation of senna.

X. Q. 43. I am only speaking now of the occasion when you saw the first bottle of it.

A. Well, that is a long time ago, and I have not any very definite recollection as to the bottles.

X. Q. 44. You didn't know at that time what the special ingredients were, did you?

A. I don't know whether I had heard previous to that time that the active ingredient was senna or not. I would not say—I could not say.

X. Q. 45. Now, when you saw that first bottle of medicine labeled in large letters "Syrup of Figs," did it convey any impression to your mind as to any constituent that there might be in it? And, if so, what was it?

(Objected to as immaterial and irrelevant and not cross-examination.)

A. Well, of course, I might have supposed that there was some preparation of figs in it.

X. Q. 46. Why would you suppose that?

(The same objection.)

A. Because the name was mentioned, "Syrup of Figs."

X. Q. 47. Did you notice on those labels a picture of a young lady gathering figs from a figtree?

(The same objection.)

A. I don't remember it.

X. Q. 48. Will you please look at the complainant's exhibit that has been put in evidence here, marked "A," and state if you recognize that as the label of the medicine that you have been referring to?

A. As well as I remember, that is the label.

X. Q. 49. Do you observe on the two ends of the label pictures of a woman gathering figs, and also on the face of the label the picture of a branch of a figtree, containing figs on it, enclosed within a circle?

(Objected to as immaterial and irrelevant, and not cross-examination.)

A. Well, I see these figures on the end, but I don't think they represent a lady gathering figs. I should be in doubt about it. She has a branch of a figtree, holding in her hand, with some figs, I think, on the branch.

X. Q. 50. Now, if an ordinary person should go into a store to buy a bottle of medicine and didn't know what its constituents were, what effect would those pictures in your judgment have upon his mind in determining as to what was the constituent or what were the constituents of the medicine? Would it, in other words, have any effect upon his mind in inducing him to suppose that any concoction of the fig entered into that medicine?

(Objected to as incompetent, irrelevant and immaterial, and not cross-examination, and as calling for an opinion of the witness upon a matter that the Court is just as well able to determine as the witness; and that it does not relate to a question of fact.)

A. He might have the impression that there was some preparation of figs in it. He may have been in-

formed previously, however, that there was not preparation of figs in it.

Mr. OLNEY—I move to strike out the answer as not competent evidence.

X. Q. 51. (By Mr. MILLER.)—I am taking the case of an ordinary person who wants a laxative medicine, who goes into the drugstore, and he sees this bottle that you have in your hand. It is reputed to be a laxative. Now, would not the natural impression produced on his mind be that that medicine contained figs in some form or other as a laxative?

(Objected to upon the same grounds stated to the previous question, that it is incompetent, irrelevant and immaterial, and not cross-examination, and that it is calling for an opinion of the witness about a matter upon which he is not shown to be qualified to testify; and, further, that it calls for an opinion of the witness upon a matter that is for the Court to determine from an inspection of the package or paper.)

A. I think an entire stranger to the preparation, if he would just see the name on the label, would naturally suppose that there was some preparation of figs in it.

X. Q. 52. Would not those pictures tend to carry out that impression also, or assist in it?

Mr. OLNEY.—I give notice that I shall move to strike out the answer of the witness to the question.

A. I think they would.

X. Q. 53. (By Mr. MILLER.)—Now, isn't it a fact, doctor, and does not everybody know it throughout the country where these medicines are sold, that those pictures put on there, representing figs, with the name

"Syrup of Figs"—that they were put on there for the purpose of inducing people who purchase the article to suppose that there was some preparation contained in the article made from the fig? Don't everybody know that?

(Objected to as incompetent, irrelevant and immaterial, and not cross-examination, and on the further ground that it asks the witness to state a fact, which is impossible for him to know, namely, that people know that that was put on there for the purpose of deceiving people, and on the further ground that it is calling for an opinion of the witness in a matter not competent to be proved by expert testimony; that he cannot give the opinion or sentiments of other people, or their knowledge, or what they suppose.)

A. Of course, I don't know anything about why it was put on there. I don't know of my own knowledge, and, in fact, I think that I never heard anybody say.

X. Q. 54. Do you know whether there are any figs in that medicine or not?

A. No, I do not, except from hearsay, but I have heard. I have an impression that there is not any figs in it. It may be hearsay.

X. Q. 55. Where did you hear that?

(Objected to as incompetent and not cross-examination.)

A. Here in San Francisco.

X. Q. 56. Did you hear it from any of these employés in the complainant's factory on Hayes street?

(The same objection.)

A. I don't know whether I ever heard them say so or not.

X. Q. 57. Would you consider it dealing honestly with the public for a manufacturer to sell medicine, labeled as syrup of figs, and containing pictures on it of figs, thereby inducing the public to buy it under the impression that it contained figs, when it had no figs in it?

(Objected to as not proper cross-examination, and as an attempt to induce the witness to usurp the functions of the Court.)

Mr. MILLER.—I think it is a very proper question, which a medical man, who knows medical ethics, can testify to, and I ask it for that purpose.

A. It is not a question of medical ethics, because medical associations have no control over the matter.

X. Q. 58. Well, as a matter of common honesty, do you think it would be right? You know what common honesty is?

(Objected to as incompetent.)

A. I don't really know that I can pass an opinion about that, because I am not familiar with the tricks of the trade.

X. Q. 59. You know of such things having been done, don't you, though, by manufacturers?

(The same objection; not cross-examination; and as tending to induce the witness to state an opinion which must be formed by the Court, and not by the witness.)

A. As far as general report is concerned, I think it is very common for manufacturers and business houses, and so forth, to make some special advertisements that will catch the public, so to speak.

X. Q. 60. Do you know in medicine of such a substance as syrup of figs?

A. In medicine?

X. Q. 61. Yes, sir.

A. Well, I think not, as a medicinal syrup, recognized in the United States Dispensatory of the United States Pharmacopia.

X. Q. 62. You do know of various syrups made from other fruits, do you not?

A. Yes, sir; there are some.

X. Q. 63. How are they generally made, in a general way?

A. Syrup of orange or syrup of lemon.

X. Q. 64. What is the syrup of orange?

A. Well, it is ordinary syrup, perhaps flavored with orange.

X. Q. 65. It has orange in it, has it?

A. Yes, sir.

X. Q. 66. That gives it its name?

A. Yes, sir; that is the reason why it is called syrup of orange.

X. Q. 67. It is flavored with orange?

A. Yes, sir.

X. Q. 68. The same with the syrup of lemon as to the lemon? A. Yes.

X. Q. 69. That is, it has flavor of lemon in it?

A. Yes, sir.

X. Q. 70. And syrup of strawberry has strawberry also in it?

A. I believe there is such a syrup, but I don't think it is recognized as a medicine, though. Perhaps it is one of the flavorings used at ice-cream stands or soda fountains.

X. Q. 71. In other words, you can make a syrup from any fruit, can't you, by giving the syrup the flavor of that fruit?

A. Yes, I think, of course, it might be called that, but, in medicine or in pharmacy, I don't know that it could be classed as a medicinal syrup.

X. Q. 72. I am speaking about outside of pharmacy, and outside of a technical sense?

A. Yes, I think so. You might call it anything you pleased.

X. Q. 73. You know a syrup of rhubarb, do you not?

A. Yes, sir; there is a syrup of rhubarb.

X. Q. 74. And a syrup of lemons, also?

A. I don't think there is in pharmacy a syrup of lemons. May be there is, but I don't remember it.

X. Q. 75. Do you know a syrup of maple or maple syrup?

A. Well, I have heard of it, but, of course, I have not seen it in any pharmacy as a medicine. It is prepared in Vermont mostly, I believe, as a food.

X. Q. 76. It is a laxative, is it not?

A. It is slightly laxative perhaps, as all syrups, of course, are slightly laxative, but it is not prescribed; it is not recognized as a laxative medicine in the sense of being a laxative medicine.

X. Q. 77. It has the juice of the maple-tree in it, hasn't it?

A. Well, it has, perhaps, the extract of the juice, one of the solid ingredients of the juice.

X. Q. 78. The natural impression evidently on a per-

son is, that it has maple juice of some kind, or extract of maple in it, isn't it?

A. I think so.

X. Q. 79. And the same way with regard to any other syrup that takes its name from any particular fruit, it is supposed that it has that particular fruit in it, isn't it?

A. I think it is the common impression.

X. Q. 81. The basis of the syrup being, I presume, sugar and water? A. Generally; yes, sir.

X. Q. 82. Then, if you add any particular kind of fruit, that gives it the flavor of the fruit, and the syrup is called by the name of that fruit?

A. I suppose, instead of having the basis of the syrup, sugar and water, they could use glucose or saccharine. I don't know how various manufacturers make it. I haven't looked into it. I am not familiar with those details.

X. Q. 83. Now, going back to the question of a moment ago, I will ask you if there is known in pharmacy, technically, any substance as the syrup of figs?

A. I didn't think so. I don't think that is an officinal syrup.

X. Q. 84. The name "Syrup of Figs" then, would indicate ordinarily the same kind of a syrup, as other fruits, with a change in the name of the fruit, wouldn't it?

A. Yes, you might say that it would indicate that ordinarily. There might be exceptions, as is supposed to be the case with this preparation.

Examination in Chief of

WINSLOW ANDERSON, M. D., a witness called on behalf of complainant; sworn.

(By Mr. OLNEY.)

Q. 1. What is your full name?

A. Winslow Anderson.

Q. 2. Your age?

A. Approximately about forty—thirty-nine.

Q. 3. What is your profession? A. Physician

Q. 4. How long have you been a physician?

A. About fifteen years.

Q. 5. Where have you practiced during that time?

A. San Francisco.

Q. 6. Are you a graduate of any medical college?

A. Yes, sir.

Q. 7. What?

A. The University of California and the Royal College of London.

Q. 8. Have you occupied any position in any medical college or school? A. Yes, sir.

Q. 9. What? A. Dean.

Q. 10. Of what school or college?

A. The College of Physicians and Surgeons.

Q. 11. Is that connected with the University of California? A. No, sir.

Q. 12. Are you acquainted with a preparation, prepared originally by Mr. Queen, and now put upon the market by the California Fig Syrup Co., known as "Syrup of Figs"? A. Yes, sir.

Q. 13. How long have you been acquainted with it?

A. From six to eight years; perhaps more.

Q. 14. Do you know whether or not it is a beneficial preparation for constipation? A. Yes, sir.

Q. 15. It is? A. Yes.

Q. 16. Do you know whether or not it is prescribed by physicians in their practice for patients?

A. It is.

Q. 17. Have you ever prescribed it yourself?

A. I have.

Q. 18. Do you know a book by Dr. Joseph M. Matthews, entitled "Diseases of the Rectum"?

A. I do.

Q. 19. Do you know whether that is a recognized authority amongst physicians in this country?

(Objected to as incompetent, irrelevant and immaterial, on the same ground interposed to the same questions asked of witness Woodward.)

Q. 20. The question is, do you know?

(The same objection.)

A. I do.

Q. 21. What is the authority?

(The same objection.)

A. The best book known on the subject.

Q. 22. In medicine when the term "Syrup of Figs" is used, what is meant by it?

A. This is the only preparation I have known of.

Q. 23. Now, if another doctor should speak to you, or a patient should speak to you about "Syrup of Figs," and in connection with medical matters or diseases, what would you understand was referred to by the speaker?

A. The product of the California Syrup of Figs Co.

Q. 24. Is there any other product on the market of any kind, except that or some imitation of it, known by the name of "Syrup of Figs," to your knowledge?

A I never saw any other than this, so far as my recollection goes.

Q. 25. Have you seen any advertisements in medical journals in the State, in which is stated that the laxative ingredient of this compound is senna? A. Yes, sir.

Q. 26. You have seen such? A. Yes, sir.

Q. 27. How long since?

A. For several years.

Q. 28. Have you or have you not seen those statements as long as you have been acquainted with the article itself?

(Objected to as leading.)

A. Yes, I think as long as I have known anything of this preparation, I have seen it stated that the laxative properties are due to senna.

Cross-Examination.

(By Mr. MILLER.)

X. Q. 1. When did you first become acquainted with this medicine?

A. It must have been six or eight years ago, perhaps more.

X. Q. 2. What were the circumstances, under which it was called to your attention?

A. By seeing the printed advertisement of the product in the medical journals.

X. Q. 3. Did you know what it was composed of at that time?

A. It was then said to be composed of senna, flavored with aromatics.

X. Q. 4. Is that all? A. Yes, as far as I know.

X. Q. 5. You have never analyzed it to know exactly what it is composed of, have you? A. No.

X. Q. 6. All you know about its constituents is what you have heard in that regard?

A. Or what I have read.

X. Q. 7. I include under that impression what you have read? A. Yes, sir.

X. Q. 8. And you have read that it is composed of senna and aromatics?

A. Flavored with syrup of figs or fig syrup.

X. Q. 9. Flavored with what?

A. Syrup of figs, with the product of the fig.

X. Q. 10. Where have you read that—that it is flavored with syrup of figs?

A. In the medical journals.

X. Q. 11. In all these papers and in the medical journals referred to? A. Yes, sir

X. Q. 12. These were advertisements that were put out by the California Fig Syrup Co., were they?

A. I suppose so.

X. Q. 13. In looking at the label, or rather, the box containing the label, which is now before you, marked marked "Complainant's Exhibit A," do you recognize that as the product that you have been referring to?

A. Yes, sir.

X. Q. 14. You have seen it put up in that style, have you? A. I have seen it in drugstores.

X. Q. 15. You have seen it in drugstores put up in that style of package, have you? A. Yes, sir.

X. Q. 16. Do you notice the pictures of the figs on the box? A. I didn't know all these were figs.

X. Q. 17. Well, look at them now, and see if you can determine whether they are figs or not?

(Objected to as incompetent, irrelevant and immaterial, not cross-examination, calling for the opinion of the witness on a point that the Court itself should form an opinion on.)

A. They look like pears.

X. Q. 18. Do you see the pictures on the ends of the box? A. Yes.

X. Q. 19. What do they represent?

A. I suppose they represent a fig leaf and a fig.

X. Q. 20. Now, when those pictures, representing figs, and the name "Syrup of Figs" are used in connection with the laxative medicine, would they not carry the impression to the mind that figs enter into the medicine as one of its constituent elements?

(Objected to as incompetent, irrelevant and immaterial, and on the further ground that it is not proper cross-examination, not relating to matters about which the witness was examined in chief; and wholly irrelevant to any issue; calling for an opinion of the witness upon a subject that expert testimony is not required.)

A. I should think so.

X. Q. 21. Is it not a common practice among manufacturers of medicine to give them a name, or very frequently,

to give them a name that will indicate to the public some one or more of the constituents of the medicine, so that the public may understand that the medicine contains that as a constituent?

(The same objection.)

A. I have no experience in these matters of my own knowledge.

X. Q. 22. What are the general constituents of a common, ordinary syrup?

A. Thirty-three per cent sugar and sixty-six per cent water.

X. Q. 23. How do you get the different kinds of syrup?

A. In many instances by using fruit, pure and simple, taking the fruit pure and simple, as in maple syrup. Most frequently, however, these syrups are manufactured from compound ethers, and have nothing to do with the fruit at all.

X. Q. 24. How about syrup of rhubarb, for instance?

A. That is largely composed of rhubarb, with the sugar and water.

X. Q. 25. How as to rhubarb prepared and put into the syrup?

A. I am no pharmacist. I don't know how it is prepared.

X. Q. 26. Now, when you speak of syrup of orange or syrup of lemon, do those terms indicate that they contain those fruits respectively, or some other portion of them?

A. I think not. They are usually made from compound ethers, so far as my experience goes—synthetically.

X. Q. 27. Do you know the syrup of orange?

A. Yes, sir.

X. Q. 28. How is that made?

A. I don't know. My impression is that it may be made by adding compound ethers to ordinary syrup; as well as by the juices of fruit, the product of fruit.

X. Q. 29. Does it not contain the juice of the orange or some portion of the orange?

A. When made from the juice of fruit, yes; when made from compound ethers, no.

X. Q. 30. Do you know how the syrup of raspberry is made? A. I do not.

X. Q. 31. Does not the fruit of raspberry enter into it some way?

A. I could not say. I am not a practical pharmacist. All I know is that they do make these syrups from a chemical standard, by adding chemical products, instead of the fruit itself.

X. Q. 32. The chemical products though, that you refer to, are extracts from fruit, are they not?

A. No, synthetical molecules prepared from extraneous matters.

X. Q. 33. In other words, it is an imitation?

A. Not necessarily an imitation. If water is made from steam, or water is made from ice, the molecules are in the steam and they are in the ice, but in one case they are put in there synthetically, and in the other case they are put in there analytically.

X. Q. 34. Has anything of that kind been done in the preparation that you have referred to?

A. I don't know.

Mr. OLNEY.—I move to strike out all this kind of testimony, on the ground that it is not cross-examination, that it does not relate to anything testified to by the witness in chief.

X. Q. 35. (By Mr. MILLER.)—Is there not a popular impression generally that figs have some kind of a laxative property?

(Objected to as incompetent, irrelevant and immaterial, and not cross-examination; as calling for something that is a matter of opinion.)

A. The skins and seeds are laxative mechanically.

X. Q. 36. I am not speaking of it in the scientific sense, but only in the popular sense, and asking you do not the public generally suppose, or have the impression, that figs have laxative properties; and has not that impression prevailed from the earliest days of history?

A. As far as I am competent to judge of public opinion, I should think yes.

X. Q. 37. Well, I understand you to say, though, as a scientific fact, whatever laxative properties the figs have, is due to mechanical action of the seed and the skins?

A. I believe that to be correct.

X. Q. 38. And that a pure syrup of figs, if such could be made, would not of itself have any laxative properties, would it?

A. Not any more than any other syrup. All syrups are slightly laxative.

X. Q. 39. Yes, I understand that, but what I mean to say, is, it would not be a laxative medicine?

A. No, it would not be given as a laxative medicine.

X. Q. 40. (By Mr. ROWE.)—You have stated that

your first knowledge of this preparation was due to your reading advertisements in medical journals, have you not? Therefore, whenever the words "Syrup of Figs" is used, you think only of the preparation of the California Syrup of Figs Co., and not of the fruit juice?

A. Yes, sir.

X. Q. 41. What would have been your impression, had you never seen the advertisements in the medical journals, if you had heard the term "Syrup of Figs" used?

A. If I had never been acquainted with this preparation, I suppose I should have thought that it was a syrup or product of the figs itself.

X. Q. 42. You state that, in the medical journals, the active principle is stated as senna? A. Yes, sir.

X. Q. 43. That is well known among the profession, is it not? A. Yes, sir.

X. Q. 44. It is because they read such information in the medical journals? A. I suppose so.

X. Q. 45. It is not probable then that the public would have become aware of its constituent elements or ingredients, unless it was stated outside of the medical journals?

(Objected to as incompetent, irrelevant and immaterial, and not cross-examination, and as calling for the opinion of the witness upon a probability.)

A. The public would soon be informed through medical journals, as they are read quite extensively in libraries and hotels, and the dissemination of knowledge through and by the physicians reading these journals.

X. Q. 46. Do you not generally, when you prescribe "Syrup of Figs," tell your patients its ingredients?

A. Yes; I frequently tell them it is a preparation of senna.

X. Q. 47. Have you had occasion to ascertain that the knowledge of your patients differed from your technical knowledge of the ingredients; that they had the impression that senna was not the active ingredient, but that it was due to fruit juice? A. I don't know.

X. Q. 48. You have stated that syrups are frequently made from ether? A. Yes, sir.

X. Q. 49. Is it generally understood, or do you know, can you state of your own knowledge, whether it is generally understood among the people generally, the public, that such is the composition of the majority of syrups; when you speak of the syrup of lemon or the syrup of strawberry, is it popularly understood that these are the product of ether, or that they are formed from fruit?

(Objected to as not cross-examination, and as calling for the opinion of the witness upon a popular belief, about which he was not examined in chief; and as immaterial.)

A. I am not competent to judge.

X. Q. 50. Would you not say, doctor, that such an opinion as that was technical knowledge?

A. Undoubtedly.

Redirect Examination.

(By Mr. OLNEY.)

R. Q. 1. You stated in answer to a question on cross-examination, that you knew the constituents from reading them in medical journals. I will ask you if, from having prescribed the medicine, and observed or known some-

thing about its operation, whether you came to any conclusion as to its constituents?

A. I think I never used it, until I learned from reading (lately) that its active principle was senna.

R. Q. 2. Then from this use did you—what I want to get at is, what opinion did you come to in regard to its ingredients, from having used it? Did you come to an opinion as to whether that advertisement was correct or not?

A. I have always believed it, and the action of the remedy has indicated it, that it was an aromatic preparation of senna.

Examination in Chief of

W. F. MCNUTT, M. D., a witness called on behalf of complainants; sworn.

(By Mr. OLNEY.)

Q. 1. What is your full name?

A. W. F. McNutt.

Q. 2. What is your profession?

A. Physician and surgeon.

Q. 3. How long have you been practicing that profession? A. Thirty years.

Q. 4. How long in this city?

A. Thirty years in this city.

Q. 5. Are you acquainted with the preparation, prepared and put up by the California Fig Syrup Co., known as "Syrup of Figs," or "Fig Syrup," used as a laxative?

A. Yes, sir.

Q. 6. How long have you known that preparation?

A. Oh, I don't know; five or six years, I guess. I could not tell you exactly.

Q. 7. Have you used it at all yourself, either personally, or in your practice?

A. It is often used in my family, yes.

Q. 8. Can you state whether or not its ingredients are beneficial for the purposes claimed?

A. It is a good laxative.

Cross-Examination.

(By Mr. MILLER.)

X. Q. 1. You say it is a good laxative, doctor. What do you understand to be its constituents?

A. Senna, my understanding is.

X. Q. 2. Senna is an old, standard laxative, isn't it?

A. Yes, a very old laxative, very old.

X. Q. 3. It has been known from time immemorial?

A. Oh, yes, yes.

X. Q. 4. And you understand from some source that this medicine is composed in part of senna?

A. Yes, sir.

X. Q. 5. And for that reason you know it to be a good laxative? A. Yes.

X. Q. 6. Do you know that the other constituents are?

A. I do not know; no.

X. Q. 7. You have never analyzed it? A. No.

X. Q. 8. Where did you, or from what source did you understand that it is composed of senna?

A. Well, I will tell you. If you are going around, go

into a family, and you ask the patient, "How are your bowels"?, and he tells you, and you ask him if he has taken any laxative and he says "Yes, I took Castoria," and I say, "Did it operate well?", and he says "Yes," then perhaps I tell him to take some more of it. And if he says he has used "Syrup of Figs" and I say, "Did it operate well?" he says "Yes," and I say, "Well, take a little more of it."

X. Q. 9. In other words, one laxative works well on one individual and not on others?

A. Yes, I tell them to take a little more of it, if it is necessary.

X. Q. 10. As long as it had been acting all right before you went there, you let well enough alone?

A. Yes, sir.

X. Q. 11. And in that way you prescribe for them to continue taking it? A. Yes.

X. Q. 12. You have never written out any prescription for it, have you?

A. Oh, I never write a prescription for "Castoria" or "Syrup of Figs." They sometimes ask me, "Doctor, I would like to take some kind of a laxative," and I say, "Well, go and get a bottle of 'Syrup of Figs,'" or "Get some 'Castoria,'" or "Get some citrate of magnesia," or some of those preparations.

X. Q. 13. Doctor, you have seen boxes containing labels such as Exhibit "A," have you?

A. I have seen them on the shelves. I have not looked at one. I have seen them in the houses. I have seen them in drugstores, but I never examined the label.

X. Q. 14. You notice the prominent reference to figs on this label, do you not? A. Yes, sir.

X. Q. 15. Does it carry the impression to your mind as to its constituents?

(Objected to as irrelevant and as improper cross-examination, for the reason that the matter was not called out on examination in chief.)

A. My impression is that it is as with many medicines that are proprietary medicines; that they get a name that will take, a trademark, to protect their product, to do business on.

X. Q. 16. That they would take a popular name, or rather, a name that would appeal to the public fancy?

A. Yes, sir; something of that sort.

X. Q. 17. Can you give any reason why a name, containing the word "figs" in it would appeal to public fancy as a laxative?

(Same objection.)

A. Well, I suppose the same as a man would put a preparation, called the "Syrup of Prunes" on the market, with the idea that some people would think that prune juice was a laxative.

X. Q. 18. In that case the manufacturer would take advantage of the general impression that prunes were a laxative, and, therefore, would call his laxative medicine the "Syrup of Prunes"? Is that your idea of it?

(Objected to as incompetent and irrelevant, and not cross-examination, not relating to matter that has been put in evidence, and assuming facts that the witness knows nothing about.) A. Yes, sir.

X. Q. 19. Now, doctor, isn't it a fact that there is a

popular impression among people at large that figs are laxative?

(Same objection.)

A. Well, I think that is a general idea; and they are, if you eat the skins and seeds.

X. Q. 20. Then a person who selects as a name for his laxative medicine some word, relating to figs, or which will call up to the mind of the purchaser, figs, in some form or other, would be doing about the same thing that a man would do who called his laxative medicine "Syrup of Prunes," would he not?

(Objected to as incompetent, irrelevant, and not cross-examination, and as calling for the opinion of the witness on a matter that is immaterial.)

A. Yes, sir.

X. Q. 21. Doctor, where did you get your first impression as to the laxative qualities of this "Syrup of Figs" medicine?

A. I expect in the families that I have attended—very likely.

X. Q. 22. That is, they told you that they had taken it and that it had acted as a laxative?

A. Acted very well; and I simply told them if it was a mild laxative and did well with them, just to take it.

X. Q. 23. Well, how did you first know that senna was in it?

A. Well, I don't know. I supposed I inquired, likely. I generally do; if I find medicine in families, inquire about the properties—inquire of the drugstores. We have proprietary medicine all the time, and if I see somebody using it, I inquire. Now, antipyrine and antikam-

nia, and all these things, I inquire in regard to where they are made and what they are used for, and what they are made of.

X. Q. 24. Now, doctor, before you had found out or heard that senna was one of the principal ingredients in this medicine, and if you had then simply seen a bottle of the stuff with this label on it, and labeled "Syrup of Figs," containing the picture of those figs, what impression would have been produced on your mind as to the laxative properties of the medicine?

(Objected to as immaterial and irrelevant, and not proper cross-examination, and as calling for a matter that is not in evidence or in issue—what impression would have been made on his mind.)

A. I would know that it contained the active principle of some ingredient that was not bitter. It is not likely that they would have put up anything that was very disagreeable. I would have thought that it would contain a laxative that was not disagreeable and not drastic.

X. Q. 25. Would you think that syrup of figs was in it, or some product of figs?

A. Oh, I would suppose that perhaps it was flavored with figs or something like that.

X. Q. 26. What do you understand to be the idea, the general idea, intended to be conveyed by the manufacturer of this medicine in putting it forth to the public as a syrup of figs, and in connection with those various pictures of figs? What is the idea intended to be conveyed to the public by the manufacturer in putting it out in that form?

(Objected to as not cross-examination, incompetent, and as calling for the opinion of the witness upon a matter that the Court, if anybody, must determine; and tending to make the witness on the stand usurp the functions of the Court.)

A. Well, I don't know. My idea would be that the manufacturer, if he wanted to manufacture and advertise a laxative, or whatever it was, he would try to get a good name to advertise it by. He would know that there was very little difference what he called his medicine, but, if he did not advertise it, it would not sell. He would commence advertising the name just as we find Ayer's "Cherry Pectoral" advertised, or Ayer's "Wild Cherry." I think they are flavored with hydrocyenic acid, or something of that kind, which gives it a slight cherry flavor.

X. Q. 27. But it has no wild cherry in it, has it?

A. It is not likely.

X. Q. 28. Can you give any reason why the manufacturer would select "Syrup of Figs," as being an appropriate name for a medicine?

(The same objection.)

A. Well, I think there is, perhaps, an impression that figs are a laxative.

X. Q. 29. And yet the medicine might be in the same category as "Cherry Pectoral," which has no wild cherry in it? It might have no figs in it? A. Yes, sir.

X. Q. 30. I presume you don't know, as a matter of fact, whether this medicine has any figs in it or not?

A. No, I don't know.

X. Q. 31. (By Mr. OLNEY.)—I understand you to say you don't know? A. No, I don't know.

X. Q. 32. (By Mr. MILLER.)—If you saw the name "Syrup of Orange" advertised, you would naturally suppose, would you not, that the person intended to convey the idea that there was orange in it in some form?

A. Well, knowing that it is not a laxative, it would not impress me in that way. I would think it was an advertising name or a trademark.

X. Q. 33. But that would be due to your personal knowledge, would it not? A. Yes, sir.

X. Q. 34. A person, not a medical man—just an ordinary, common individual—would not have that same impression, would he?

(Objected to as calling for the opinion of the witness upon a matter that it is impossible for him to know, and as not cross-examination.)

A. I would naturally suppose that he would likely think that there was some orange juice. It would be natural for him to think that there was some orange juice in it, though he would know it was not the orange juice that was the active ingredient, if it was advertised as a laxative medicine—as a cathartic; he would know from his experience in eating oranges that there was some cathartic in it as a laxative medicine.

X. Q. 35. (By Mr. ROWE.)—I would like to repeat that question in another form: I suppose that the first impression you received from that ingredient, when you first saw it named, was that it contained some active cathartic principle?

A. Some laxative principle.

X. Q. 36. Suppose the position had been reversed, and you had been the patient, and your patient had been the

doctor, what would have been the impression upon your mind as a patient, when you first heard the word "syrup of figs," used in connection with a laxative medicine?

(The same objection.)

X. Q. 37. Would there have been some impression upon your mind then that there must have been some active principle, and not the syrup of figs or fruit juice that was the cathartic?

A. Yes, sir; I suppose I would know that a teaspoonful of syrup of figs would not act as a cathartic medicine.

X. Q. 38. We are assuming that you are the patient?

A. Yes, I would know from my own experience, likely, if I knew anything of figs.

X. Q. 39. Suppose you were a resident of the East, where figs are not raised, and that you had had no familarity with the fruit whatever, except generally, what is popularly understood in regard to it, would you then have that same opinion that a teaspoonful would not be laxative?

(Objected to as not cross-examination, improper, calling for the opinion of the witness upon an impossible state of facts.)

A. Well, you are speaking now of my own opinion, not what the public would think?

X. Q. 40. I am speaking about what you would be as a member of the public, if you were not a physician, and had not your technical knowledge.

A. Well, I think I would have sense enough to know that a fruit which is used as a food would not—a teaspoonful or a tablespoonful of the juice would not act as a cathartic, if I gave it any thought at all.

Examination in Chief of

D. A. HODGEHEAD, M. D., a witness called on behalf of complainant; sworn.

(By Mr. OLNEY.)

Q. 1. What is your business or occupation?

A. Practicing medicine and surgery.

Q. 2. How long have you been engaged in that practice? A. For fourteen years; a little over.

Q. 3. Where?

A. Always in California; and for the last nine years in San Francisco.

Q. 4. Are you a graduate of any medical college?

A. Yes, sir.

Q. 5. What college?

A. The Bellevue Hospital Medical College in New York.

Q. 6. Do you occupy any special position in relation to your profession? A. Yes, I do.

Q. 7. What is it?

A. I hold the chair of Obstetrics and Diseases of Children in the College of Physicians and Surgeons; I am also secretary of the Faculties.

Q. 8. In your practice as a physician, have you become acquainted with the medical preparation put up by the complainant in this case, and known as "Syrup of Figs" or "Fig Syrup"? A. I have.

Q. 9. How long have you been acquainted with it?

A. I can't answer that positively, but possibly six or eight years.

Q. 10. Have you had occasion to use it in your practice?

A. Yes, sir; I have used it frequently.

Q. 11. Do you know whether or not other physicians use it?

A. Only in a general way. I don't know positively that other physicians use it. I don't think I have had occasion—well, yes, I can say that I have heard others say that they have used it.

Q. 12. Have you made any inquiries to ascertain whether, or made any examinations to ascertain whether, it is a beneficial compound or otherwise?

A. I have my own experience to go by. I have used it, proved the benefit.

Q. 13. Have you been informed as to what its principal laxative qualities come from?

A. Yes, sir; or I have informed myself in whatever way I could. I have always tried to do that in regard to any medicine I see.

Q. 14. You did inform yourself in regard to this?

A. I did.

Q. 15. Do you know of any other compound or preparation of any kind that goes by the name of "Syrup of Figs" except that particular article?

A. No other to my knowledge.

Q. 16. When the term "Syrup of Figs" is used in the profession in any conversation what does it refer to?

(Objected to as incompetent, irrelevant and immaterial, because the medicine is sold to the public at large, and the question should be what impression it conveys to the mind of the public at large, and not to medical men who have a technical training.)

A. It refers to this preparation made by the California Fig Syrup Co., so far as I am informed.

Cross-Examination.

(By Mr. MILLER.)

X. Q. 1. Well, how far have you been informed on that subject, doctor?

A. I say so far as I am informed. The medicine is mentioned among the profession and it is advertised in the journals and mentioned in the articles written in the journals, and in that way I am informed of the preparation, so far as I am in regard to that or any other preparation.

X. Q. 2. Have you not seen other syrups of figs advertised by other people?

A. I don't remember ever to have seen any other advertised.

X. Q. 3. Don't you know that there is another "Syrup of Figs" manufactured and sold largely in the East?

A. No, I do not.

X. Q. 4. Do you know the firm or have you ever heard of the firm of Frederick Stearns & Co. of Detroit?

A. Yes, I have heard of Frederick Stearns & Co. frequently.

X. Q. 5. Haven't you heard that they manufacture and sell "Syrup of Figs" also?

A. I have never heard it.

X. Q. 6. Then it is because you have never heard of any other "Syrup of Figs" except that of complainant's that you based your recent testimony that, when the term

was used, so far as you were informed, it referred to complainant's? That was the basis of your testimony?

A. I have not heard of any other preparation.

X. Q. 7. When did you first come in contact with this medicine?

A. Well, that I could not say positively; six or eight years ago.

X. Q. 8. Do you remember the circumstances?

A. I do not.

X. Q. 9. I presume you simply know of it in a general way as you do of other proprietary medicines that have been on the market for a number of years?

A. That is the way in which my knowledge to a certain extent is derived.

X. Q. 10. You never analyzed it, did you?

A. No.

X. Q. 11. You don't know of your own knowledge what are the actual constituents, do you?

A. I don't know of my own knowledge what are the actual constituents of any proprietary medicine.

X. Q. 12. Are those things generally kept secret?

A. Not of the proprietary medicines, no. They are generally advertised.

X. Q. 13. Is this a proprietary medicine?

A. I so understand it.

X. Q. 14. Then are not the constituents of this advertised? A. Yes, they are.

X. Q. 15. What are they advertised to be?

A. The active principle is advertised to be senna.

X. Q. 16. Well, that is only one constituent. Do they advertise what the others are?

A. I don't think, as far as my recollection goes, that they do. It says that the main principle is senna flavored with aromatics. It does not state—the only thing that we are concerned in, is the active principle. We do not care whether it is flavored with orange or fig or some other flavor.

X. Q. 17. You know that that active principle, senna, is a standard medicine, do you not, and a proper one to take for that purpose?

A. I know that it is a standard medicine. I know that it is usually disagreeable when it is used a great deal, and if we can get rid of its disagreeable taste and put it up in some agreeable form, that is what we desire, and we use it.

X. Q. 18. Well, the other things that are put in there in the shape of aromatics do not cut any figure in the properties of the medicine itself?

A. No, sir. I think not.

X. Q. 19. It is the senna that you refer to?

A. It is the senna that we are after, that I am after.

X. Q. 20. Would the juice of figs, if put in a medicine, cut any figure? A. Well, no; not at all.

X. Q. 21. Would it add anything to its medicinal properties? A. I think not.

X. Q. 22. Neither would it take away any of its medicinal properties? A. No.

X. Q. 23. It would be simply superfluous?

A. It might be good as a flavoring, to improve the taste of the medicine.

X. Q. 24. If it was good for anything it would be simply as a flavor? A. That is all.

X. Q. 25. Do you know whether there is any syrup of figs in this medicine or not? A. I do not.

X. Q. 26. You never saw any statement to that effect?

A. I don't remember that I did.

X. Q. 27. Now, from hearing the name "Syrup of Figs" applied to a laxative in connection also with the pictures of figs on the box would not the natural conclusion be to a person seeing it for the first time, that figs of some kind entered into the composition of the medicine?

(Objected to as incompetent, irrelevant and immaterial and as calling for the opinion of the witness upon a matter that the Court must pass upon; and further that it is not proper cross-examination, no examination having been made of the witness upon that matter in his direct examination.)

A. I think it would depend entirely upon the person's knowledge of a question of this kind. If he knew anything about figs he would know that figs were not sufficiently laxative to be used for such a purpose; and if he knew further anything about proprietary medicine he would know that the name of a proprietary medicine signifies but very little as to the uses or its medicinal qualities.

X. Q. 28. Names are generally selected for advertising purposes, I presume?

A. They are generally selected for advertising purposes, to attract attention, like the name "Listerine" which came out years ago and has been used as a wash. Everybody knows it. The name is taken from the name of the man Lister who was the first man who made any progress in antiseptic surgery.

X. Q. 29. Can you give any reason why the name "Syrup of Figs" would be an appropriate or attractive one to the public to designate a laxative medicine? Why would they select that name?

(The same objection.)

A. I don't believe I can. It seems to me it would be a business proposition. If they thought it would appeal to the public they would use it. I don't know any other reason.

X. Q. 30. In what way would it appeal to the public?

A. Well, I must confess as a physician that I was raised in a country where there were no figs, and although I had heard of them frequently in California, I was never informed that figs were a laxative, that is, before I studied medicine.

X. Q. 31. You never knew of that popular impression?

A. I didn't know even of the popular impression that figs were a laxative. I didn't know anything about figs. I was raised in a country where we never got them green.

X. Q. 32. You heard of that popular impression after you studied medicine? A. Yes.

X. Q. 33. It is a well known fact, that is, popularly known among people to-day, is it not?

A. I don't know that it is popularly known among people to-day that figs are laxative any more than any green fruit is laxative to some extent.

X. Q. 34. You know that prunes are laxative, or that there is an impression to that effect?

A. There is an impression that prunes are laxative. Prunes are probably more laxative than almost any green fruit. Probably the most laxative of any green fruits.

X. Q. 35. If you were to see a medicine advertised as a laxative medicine under the name "Syrup of Prunes" would there not be an impression conveyed to your mind as to its constituents, assuming that you didn't know what the constituents were, of your own knowledge?

A. Assuming that I didn't know that prunes were a laxative?

X. Q. 36. No, I say, assuming that you didn't as a matter of fact know what the constituents of the medicine were; that all you knew was that it was a laxative and that it was advertised under the name "Syrup of Prunes," what impression would be conveyed to your mind as to the constituents or any of the constituents of such a medicine?

(The same objection.)

In other words, would you suppose that the manufacturer intended to convey the impression that prunes in some form or other entered into the medicine?

A. Oh, I suppose that I might answer that in the same way that I did the other, knowing what I do of these things, and that the name of a proprietary medicine carries with it very little idea of what the medicine contains; I would not attach much importance to the name of it.

X. Q. 37. Suppose it was called the "Syrup of Strychnia," do you think that would be an appropriate name for a laxative medicine?

A. It would not be an appropriate name for a laxative medicine, no, because strychnia is not laxative.

X. Q. 38. Supposed it was called "Syrup of Green Persimmons," would that be an appropriate name for a laxative medicine?

(Objected to as incompetent, irrelevant and immaterial, not proper cross-examination.) A. No, I think not.

X. Q. 39. Why do you think it would not be a proper name for a laxative medicine?

A. I don't think it would be a proper name for a laxative medicine, because green persimmons or strychnia are known not to be laxative. But if the name "Syrup of Green Persimmons" was put on a bottle and under it was said that it was to be used as a laxative, I would suppose that it contained something that acted as a laxative.

X. Q. 40. Would "Syrup of Figs" be an appropriate name for a laxative?

A. No, it would not be, if it was intended that you should understand that the ingredients of the figs was the medicine there which would act as a laxative, and that the name "Syrup of Figs" was intended to convey that impression, it would not be an appropriate name, because it would not do what it was advertised to do.

X. Q. 41. Could you give any reason why a man would take "Syrup of Figs" as a proper name for his laxative, and spread over the wrappers pictures of figtrees and of young ladies gathering figs—could you give any reason for such a course as that?

A. No, I don't think I could read the man's meaning in that form. I would not like to assume to say what some other man's reason was for putting such a label on his bottle.

X. Q. 42. In view of the fact that there is a popular impression that figs are laxative, is it not probable that the name was selected in order to take advantage of that

impression and to induce the public to think that this was some preparation of figs?

(Objected to as not cross-examination, the witness not having been called upon to testify as to probabilities, especially to probabilities in the mind of individuals, and upon the assumption that there is a popular impression that figs are laxative? A. I don't know.

X. Q. 43. Well, now take the case of yourself before you studied medicine or knew anything about medicine any more than your general education outside of medicine would instruct you—if you were to buy a bottle of this medicine labeled "Syrup of Figs," and it was stated it was a laxative, and you also were aware of the popular impression that figs were laxative in their properties, what impression would be on your mind from seeing that label with that name on it and the picture of these figs, as the figs being in the medicine, or a part of it?

(Objected to as immaterial and irrelevant and not cross-examination, assuming matters that are not in evidence.)

A. The question is a hard one to answer, in that it asks me to give an opinion about something based on a supposition that I have a certain knowledge; that is, it asks me what I would think of a certain thing if I had certain information about it.

X. Q. 44. That is what the question is that I asked you?

A. I don't know what I might think of a thing if I had certain information about it.

X. Q. 45. Then you can't answer what would be the impression that would be conveyed to your mind?

A. I can't state what impression would be conveyed

to my mind upon anything until I had gotten the information about it.

X. Q. 46. Would you think that there were any figs in it at all?

(The same objection.)

A. That would depend entirely upon how much knowledge was brought to bear upon my mind. If a person brought to me a preparation and said there were figs in it, and I had no good reason to believe otherwise, I would believe that his preparation was composed as he stated.

X. Q. 47. Suppose he brought you a preparation and said this was a good laxative and didn't say whether figs were in it or not, and all you knew in regard to what it was composed of was by seeing the name "Syrup of Figs" upon it, what would be the effect upon your mind?

A. I would suppose that there were figs in the preparation if it was called "Syrup of Figs."

X. Q. 48. If a person should bring to you a bottle labeled "Syrup of Orange," would you not suppose that it was flavored with orange or that orange in some form entered into the composition of it?

(The same objection.)

A. I think that in that case I would suppose that there was orange in it. The question asked me a little while ago in regard to syrup of strychnia, for instance. There it would be very improbable to believe such a thing, because there is no such thing as syrup of strychnia. I would suppose if it was called "Syrup of Orange" that there was orange in it, because we know there is such a thing as syrup of orange.

X. Q. 49. And that expression naturally conveys the idea that the orange enters into the concoction in some way?

A. Yes, because I know that there is such a thing as syrup of orange. I know there is a preparation "Syrup of Orange." But there is no such preparation in pharmacy known as "Syrup of Figs."

X. Q. 50. Don't you know that a preparation has been known in pharmacy for a long time as syrup of figs, as early as the year 1875?

A. Yes—no; I don't know that there was such a preparation, and looking up the official preparations I can say that I never saw any mention of syrup of figs.

X. Q. 51. Don't you know that syrup of figs has been published in French books on pharmacy as early as 1875?

A. No, I don't know that.

X. Q. 52. The use of the name of any particular fruit in connection with syrup carries the idea that the syrup is flavored by that fruit, does it not?

(The same objection.)

A. I would suggest that a pharmacist is more competent to answer that question than I am, but I think that in pharmacy the name of a fruit in connection with any syrup indicates that the syrup is flavored with the fruit. I say that is a part of pharmacy; we have in pharmacy certain syrups that are flavored with certain fruits. But there are comparatively few of them.

X. Q. 53. If it should be a fact that in over one thousand gallons of this medicine of complainant's there was only one gallon of fig juice, would that fig juice have any

appreciable effect upon the medicine, or could it be detected? A. I don't think it could.

X. Q. 54. It would have no more effect than a gallon of any other saccharine matter? A. None whatever.

X. Q. 55. It would not give it any medicinal properties? A. No.

X. Q. 56. And the medicine would be just as good without it as with it? A. Yes, sir.

Redirect Examination.

(By Mr. OLNEY.)

R. Q. 1. In your cross-examination you said that senna had long been recognized as an excellent laxative, but that it was disagreeable to take, and you spoke about its bitter taste. Does it have any other disagreeable effect?

A. Yes, it is disagreeable in its action, it has a griping effect.

R. Q. 2. On the bowels? A. Yes, sir.

R. Q. 3. Then if a preparation of senna can be made which will obviate the griping effect and disagreeable taste, it becomes a good laxative, does it?

A. Yes, sir.

Recross Examination.

(By Mr. MILLER.)

R. X. 1. Would figs or fig juice accomplish that?

A. It would not.

R. X. 2. So that if that purpose is accomplished in

complainant's medicine, it is accomplished not by fig juice but by something else? A. By something else.

R. X. 3. And that something else is not published to the world?

A. It is to this extent, that the active principle of senna which was introduced into this syrup of figs—its properties are owing to the peculiar methods pursued in extracting those active principles from the senna.

(Further hearing continued to Thursday, October 13, 1898, at 10 A. M.)

Thursday, October 13, 1898, 10 A. M.

Counsel appearing:

For complainant, Warren Olney, Esq.,

For respondents, John H. Miller, Esq., and Purcell Rowe, Esq.

(Note by stenographer.—At the opening of this session, the examination in chief of R. E. Queen was resumed. By request of attorneys for the respective parties the transcript of his testimony is introduced in this record, commencing with page 28. Further hearing adjourned to Friday, October 14, 1898, at 10 A. M.)

Friday, October 14, 1898, 10 A. M.

Counsel appearing:

For complainant, Warren Olney, Esq.,

For respondents, John H. Miller, Esq., and Purcell Rowe, Esq.

Examination in Chief of

HENRY MICHAELS, a witness called on behalf of complainant; sworn.

(By Mr. OLNEY.)

Q. 1. What is your business, Mr. Michaels?

A. A wholesale druggist.

Q. 2. Where? A. San Francisco.

Q. 3. How long have you been in that business in San Francisco? A. Since 1864; that is, connected with it.

Q. 4. What is the name of your house?

A. Langley & Michaels Company.

Q. 5. It is an incorporation, is it? A. Yes, sir.

Q. 6. Are you acquainted with the medical preparation put upon the market by complainant, the California Fig Syrup Co? A. I am.

Q. 7. How long have you been acquainted with *from* product or preparation?

A. Well, I would say, from recollection, more than ten years.

Q. 8. By what name is that preparation known to the trade? A. "Fig Syrup."

Q. 9. Is there any other preparation or product upon the market that goes by the name "Fig Syrup" or "Syrup of Figs"?

A. I think there is one comes here from New York; I am not sure though. I think it is called the Garfield Tea Fig Syrup.

Q. 10. Is there any other that you know of?

A. We don't come in contact with it if there is. At least I have never seen it.

Q. 11. Do you keep yourself informed in regard to proprietary medicines upon the market?

A. Generally I think I do.

Q. 12. If any medicine is a popular medicine you know it, do you? A. I do.

Q. 13. Do you deal in all popular proprietary medicines? A. We claim to; yes, sir.

Q. 14. Do you know whether or not the product of complainant, known as "Syrup of Fig" or "Fig Syrup" is a popular medicine? A. I do.

Q. 15. What is it? A. It is.

Q. 16. Now prior to your becoming acquainted with this production, did you know or had you ever heard of any product being upon the market or in use, by the name of "Syrup of Figs" or "Fig Syrup"? A. No, sir.

Q. 17. Who was it that first originated the term "Syrup of Figs" or "Fig Syrup"?

(Objected to unless it is shown that the witness knows who originated it.)

Q. 48. Answer the question. Who was it who first originated the term "Syrup of Figs" or "Fig Syrup" as used in the drug trade?

A. I understand Mr. Queen, or the firm with which he is connected.

Mr. MILLER.—I move to strike out the answer on the ground that it is not testimony.

Q. 19. (By Mr. OLNEY.)—How do you understand that, Mr. Michaels?

(Objected to as incompetent, irrelevant and immaterial.)

Q. 20. You say you understand that it was Mr. Queen?

A. The first we knew that was when it was offered by Mr. Queen in this market. He was the first person we ever knew to have anything to do with it at all.

Q. 21. Was he the first person that ever to your knowledge used the name "Syrup of Figs" or "Fig Syrup" as applied to a medicine? A. Yes, sir.

Q. 22. Have you ever known the term "Syrup of Figs" or "Fig Syrup" to be applied to any other product except the complainant's production, until within the last few years? A. No, sir.

Q. 23. What do you understand in regard to any other product that may be upon the market now and going by the name of "Syrup of Figs"?

(Objected to as incompetent, irrelevant and immaterial, because what the witness understands is certainly not competent testimony.)

(Q. 23 read.)

Q. 24. I refer to the drug trade?

(Same objection.)

A. It is looked upon as an imitation.

Q. 25. As to what you understand as used in the drug trade?

(The same objection.)

A. Well, I don't understand.

Q. 26. You state it is looked upon as an imitation. I have asked you what you understand in regard to it?

A. I understand it to be an imitation.

Q. 27. You understand it is an imitation? An imitation of what?

(Objected to as irrelevant.)

A. I don't mean it in that sense exactly. But it is put up in that way simply because the other trademark became popular. And they use it for that reason, because it is well known.

Q. 28. Do you know whether this preparation has been used extensively or not upon the Pacific Coast?

A. It is.

Q. 29. Do you know of any preparation whatsoever, medicinal or otherwise, that has been known to the trade by the name "Syrup of Figs" or "Fig Syrup," except this preparation made by complainant?

A. Only those that have come up in the last two or three years; one put up in Oakland, I believe, used the name. I understood that they were stopped by the Courts. They have used the name in that way as an imitation.

Q. 30. But do you know of any preparation that has ever been sold either as a food or as anything else, by the name "Syrup of Figs" or "Fig Syrup," prior to the use of that name by complainant in this action?

A. I do not.

Q. 31. Do you in your business find it necessary to know what the staple articles are in stock kept by retail druggists? A. Yes, sir; I do.

Q. 32. Can you state whether or not complainant's product is a staple article kept and sold by retail druggists throughout the country? A. It is.

Cross-Examination.

(By Mr. MILLER.)

X. Q. 1. Did I understand you to testify of your own knowledge that these other syrup of figs that are on the market were imitations of complainant's and were put up by the parties who put them up because of the popularity of complainant's trademark?

A. I mean imitations of name, the name "Syrup of Figs."

X. Q. 2. Do I understand you to testify that those parties actually put them up for that purpose?

A. I do.

X. Q. 3. How do you know that?

A. I don't know as I get your exact meaning. I know it for the reason that this being a popular trademark, these people are presumed to put up the medicine in that way to take advantage of the popularity of these goods.

X. Q. 4. That is just what I am trying to get at. You say now you presume they are put up in that way. On your direct testimony you swore positively that they did put them up in that way.

A. That is what I say; to the best of my knowledge and belief that is what they do it for, for this purpose.

X. Q. 5. Of course, you don't know that of your own knowledge, do you? A. I think I do.

X. Q. 6. What is the basis of your knowledge?

A. My general contact with the drug trade.

X. Q. 7. Did they tell you that they put it up for that purpose? A. No, sir.

X. Q. 8. Well, then, how do you know? How can you come here to testify on your oath to a fact that you don't know of your own knowledge?

A. I know by my business experience that people put it up for that purpose. That is all I can say.

X. Q. 9. That is merely a conclusion that you arrive at—that they put it up for the purpose of imitating this trademark, is it not? A. Yes, that is my conclusion.

X. Q. 10. You don't know how long these people have been putting it up, do you? A. I do not.

X. Q. 11. You don't know when they commenced to put it up, do you?

A. I don't know that they put it up at all. I simply know that the article comes into the market.

X. Q. 12. Where does the article come from?

A. I could not tell you.

X. Q. 13. You don't know what people put it up, do you? A. I don't except by general report.

X. Q. 14. You don't know where it is manufactured, do you? A. I do not.

X. Q. 15. Do you know of a syrup of figs that is manufactured by Frederick Stearns & Co. of Detroit?

A. I never saw it.

X. Q. 16. Did you ever hear of that article manufactured by that firm? A. Not to my knowledge.

X. Q. 17. That is a large manufacturing drug house of Stearns & Co., is it not?

A. Well, it is understood to be a nonsecret firm.

X. Q. 18. It is a large firm, is it not?

A. Yes, sir; a large firm.

X. Q. 19. It sells its products on this Coast as well as in the East, does it not? A. It does and largely, too.

X. Q. 20. You make it a part of your business to be acquainted generally with the products of various manufacturing drugstores, do you not?

A. That is my business.

X. Q. 21. Now did you never hear of "Syrup of Figs" being put on the market and sold by that firm?

A. I did not. We sell their goods, those that are well known here, and they put up other goods which we never come in contact with.

X. Q. 22. You do sell some of their goods, do you not?

A. Oh, yes, we do.

X. Q. 23. Did you ever see a publication issued by them called the "New Era"?

A. I have I think, but it does not naturally come in contact with me in that way. We simply get their price-lists of goods they push here.

X. Q. 24. Who puts this article called "Garfield Tea Fig Syrup"?

A. A firm in New York called the Garfield Tea Company.

X. Q. 25. Do they send that article out here for sale?

A. They do. I wont be positive about that name, but that is my impression as to what they call it. It has a very trifling sale.

X. Q. 26. Did you ever sell any of that medicine?

A. I believe I did.

X. Q. 27. Here on this Coast?

A. Very small quantities. I don't know. My memory is it is a ten-cent article. I could not say as to that.

X. Q. 28. Did it come to you in the ordinary course of druggists' trade? A. Yes, sir.

X. Q. 29. Did you receive orders from other persons for it or did you carry it in stock, or what?

A. We receive orders.

X. Q. 30. And when you received orders for it, you supplied yourself with it and then sold it to the persons asking for it, did you? A. We did.

X. Q. 31. How long ago was that?

A. Within the past two years.

X. Q. 32. Was it a laxative medicine, used for those purposes? A. Supposedly.

X. Q. 33. Do you know what is the basis of this "Fig Syrup" of complainant's? A. I do.

X. Q. 34. What is it? A. Senna.

X. Q. 35. What else is there in there?

A. I could not tell you that.

X. Q. 36. Are there any figs in it?

A. I have always understood there were some; not as a controlling factor at all; simply to give it a flavor or something of that sort.

X. Q. 37. What did you understand the figs were put in there for? A. To flavor the medicine.

X. Q. 38. Isn't the quantity of figs so very small that it does not flavor the medicine?

A. Well, I would not think that. I don't know what the quantity is. I never tasted it myself.

X. Q. 39. Isn't it a fact that there are aromatics placed in the medicine for the purpose of giving it a taste?

A. I don't know that.

X. Q. 40. You don't know what the constituents of it are, do you?

A. I simply know in a general way that senna is the controlling medicine, as I have always understood.

X. Q. 41. Do you sell other kinds of syrup in your drug business? A. We do.

X. Q. 42. What syrups do you sell? Name some of them.

A. Well, Schenk's Pulmonary Syrup, Winslow's Soothing Syrup, Winchell's Syrup, Fellows' Syrup of Hypo-Phosphates; there are others, but I don't happen to recollect them just now.

X. Q. 43. Do you sell or have you ever known of a syrup of rhubarb?

A. Yes; a pharmaceutic preparation; yes; we make that in our store.

X. Q. 44. How do you make that in your premises?

A. I am not a manufacturing druggist. I don't seem to know that. I could not give you the formula.

X. Q. 45. I didn't ask you for the formula. I asked what are the constituents of it?

A. It is made from rhubarb.

X. Q. 46. A simple syrup, I suppose, is nothing more than sugar and water or some kind of saccharine matter and water? A. Yes, sir.

X. Q. 47. Then when you add the rhubarb to it you call it syrup of rhubarb?

A. Oh, that is not precisely it.

X. Q. 48. You use rhubarb in it? A. Yes, sir.

X. Q. 49. Why do you call it syrup of rhubarb?

A. Because it is a syrup of rhubarb.

X. Q. 50. Why is it you apply the name rhubarb to it in preference to some other name?

A. Because that is the cathartic principle in the article.

X. Q. 51. Does the rhubarb give it its distinctive flavor? A. Certainly.

X. Q. 52. When you call it syrup of rhubarb that is the intention you have, to convey the idea that there is rhubarb in it? A. Yes, sir.

X. Q. 53. How is it in regard to any other syrup, say, syrup of orange, for instance? What does that indicate?

A. Well, orange itself has no particular virtue that I know of, except to add to the flavor.

X. Q. 54. Does the orange give it its flavor?

A. Yes, sir.

X. Q. 55. Then, orange is used in the manufacture of the syrup, is it not? A. They use it in that way.

X. Q. 56. Would that same testimony apply to syrup compounded with other fruits as well?

A. Well, I would not like to say.

X. Q. 57. That is, would the name of the syrup be suggested by the name of the fruit that was put in it?

A. Well, ordinarily, yes. Take raspberry syrup or lemon syrup. Of course, they are simply for flavoring.

X. Q. 58. Now, what does raspberry syrup indicate?

A. That it has raspberries in it.

X. Q. 59. What does lemon syrup indicate?

A. That is has lemon in it.

X. Q. 60. Does it indicate that those fruits give the syrup its distinctive flavor? A. Yes.

X. Q. 61. Now, take an ordinary individual, Mr. Michaels, who has no knowledge of pharmacy, or preparations made in a laboratory, what impression would be

produced on his mind from seeing on the first occasion a bottle labeled "Syrup of Figs," without knowing actually what its constituents were. What would be the impression created on his mind as to the ingredients or any of the ingredients of that article?

(Objected to as incompetent, irrelevant and immaterial, and as relating to matter as to which the witness was not examined in chief, and calling for the opinion of the witness upon a matter in regard to which he has not testified.)

A. I don't know.

X. Q. 62. Suppose you were to exhibit to an ordinary individual a bottle labeled "Syrup of Raspberry," what do you supose would be the impression created on his mind, if any, with regard to the constituents of the syrup?

A. That it contained raspberry.

X. Q. 63. If you exhibited to him a bottle labeled "Syrup of Figs," what would be the impression on his mind as to that?

(Objected to as not proper cross-examination for the reasons stated in the last foregoing objections.)

A. I don't know.

X. Q. 64. What does the name "Syrup of Figs" indicate in ordinary language?

A. To the trade do you mean?

X. Q. 65. No; in ordinary language, what is the meaning of those words "Syrup of Figs" ?

A. Well, I never heard the name applied until these people took it up.

X. Q. 66. If you were to hear the word "syrup" applied to a new vegetable or fruit to which it had never been applied before, what would that indicate?

A. Well, in medicine I would take it to indicate a compound. It is common practice in putting up proprietary medicines to invent or take names, catchy phrases, as we call them. They use this in that way. Some of them coin words altogether.

X. Q. 67. Is it a common practice to employ a phrase as indicating a compound which incorrectly described the contents of the compound?

A. Well, it does not imply that exactly, but it does not convey to the dealer's mind, at least, the idea that that compound is solely composed of that article. Now, you take sarsaparilla. That is one of the commonest articles named in the drug trade, but that is only an agent. It is the most unimportant part of the whole compound.

X. Q. 68. Do you mean by that that the term "Syrup of Figs" does not indicate to the druggist that the article is composed of a syrup made from figs?

A. Not entirely, no; not at all.

X. Q. 69. Do you know whether it carries that impression to the mind of an ordinary individual who knows nothing about pharmacy, but who wants to buy a laxative medicine? A. I do not.

X. Q. 70. That you don't know anything about?

A. No.

Redirect Examination.

(By Mr. OLNEY.)

R. Q. 1. You spoke about Frederick Stearns & Co. being manufacturers of nonsecret medicines. What is understood by that in the trade?

A. Well, nonsecret medicines are understood by the trade to be such articles as will come pretty near in appearance and quality to well-known patent medicines, for the purpose of selling in their place.

R. Q. 2. Practically, then, what is known in the trade as a manufacturer of nonsecret medicines is one who manufactures articles as nearly like the proprietary or patent medicines as possible, in order to take the place of these medicines in the trade? A. Yes.

R. Q. 3. That is the understanding in the trade?

A. That is the understanding, yes.

Recross Examination.

(By Mr. MILLER.)

R. X. 1. They publish the formulas under which they manufacture the articles, do they not?

A. I believe some of them do.

R. X. 2. That is why they are called nonsecret manufacturers? A. Yes; I think so.

R. X. 3. Instead of having a secret formula and imposing upon the public in that way, by palming off the article that they are afraid to give the constituent of, these nonsecret manufactuers publish to the world the formula?

A. I don't know what their theory is. I know the object is to get the benefit of the popular medicine.

R. X. 4. (By Mr. OLNEY.)—Their practice is to sell imitation of other articles?

A. Well, displace well-known articles.

R. X. 5. (By Mr. ROWE.)—Are you a manufacturer at all, Mr. Michaels? A. Not in a large way.

R. X. 6. Do you manufacture at all?

A. We do manufacture.

R. X. 7. Are all of your preparations put up by a formula invented or introduced by yourself?

A. Oh, no, they are mostly staple articles.

R. X. 8. Do you put up any product or any preparations that are sold by other firms, other houses?

A. Yes.

R. X. 9. Do you ever put up a preparation that has been antecedently sold by some drug house or manufacturer of the preparation?

A. No, not except it is public property, you know.

R. X. 10. You don't put up any compound or any preparation or any article except some article that is public property, that is, anybody in the United States has a right to put it up?

A. Oh, no, we also have trademarks that we own ourselves.

R. X. 11. Those trademarks apply only to articles or preparations that you invented the formula of?

A. No, we didn't invent them at all, we simply bought the trademark.

R. X. 12. What I am trying to get at is this: is there any preparation that you sell that you claim is manufactured by your firm that was, prior to your manufacture of that preparation, sold by some other drug firm in the United States, that was not a formula that was public property?

(Objected to as immaterial and irrelevant, and as asking a question on cross-examination in regard to which the

witness was not examined in chief; therefore not proper cross-examination.)

A. I don't really know how to answer that question. If you mean to say that we put up any imitations of goods, I must say no.

R. X. 13. Do you put on the market any preparation that you were induced to manufacture because it had a popular sale and it had been first introduced to the trade by some other firm?

(Objected to as improper and not cross-examination, and as a question that ought not to be put to the witness on the stand.

R. X. 14. Have you ever put on the market an article because it had already an established popularity?

A. If the gentleman means to ask me if we have used a name adopted by any other party for putting up goods here, I say no, unless we had a clear right to put on the trademark in that way.

R. X. 15. Have you ever done this: Have you ever, realizing that some particular preparation or product of some manufacturer which had gained a popular reputation and was largely sought for by the drug trade, have you ever taken the name of this popular article and used it on your preparation?

A. Well, we have put up goods in this way, for instance, that is, nonsecret people offer to our trade goods put up that they call, for instance, sarsaparilla, and they put them up in a popular way, and we have also done the same thing.

R. X. 16. Can you state one particular case?

A. Oh, that is sarsaparilla.

R. X. 17. What was the name of that article before you manufactured it?

A. Sarsaparilla. It has been a common name ever since I have been in the drug business.

R. X. 18. Do you recollect any other?

A. I do not.

R. X. 19. And you call your article what?

A. Sarsaparilla.

R. X. 20. Then you put up sarsaparilla and call it sarsaparilla? A. It is a common name.

R. X. 21. Have you ever been requested by any of your patrons, customers, to put up a syrup of figs?

A. I don't think so. I think they would know better than to ask us.

R. X. 22. Have you any interest in this corporation known as the California Fig Syrup Co., complainant?

A. None whatever.

R. X. 23. You never were connected with it in any form whatever? A. No, sir.

R. X. 24. Except to sell their product as any other druggist would, or wholesale firm? A. That is all.

Examination in Chief of

W. P. REDINGTON, a witness called on behalf of complainant; sworn.

(By Mr. OLNEY.)

Q. 1. What is your business, Mr. Redington?

A. Wholesale druggist.

Q. 2. How long have you been in that business?

A. I have been connected with the wholesale drug business since 1862.

Q. 3. How long in this city?

A. Since that time.

Q. 4. What is the name of the house or corporation with which you are connected?

A. Redington & Co.

Q. 5. Wholesale druggists?

A. Wholesale druggists.

Q. 6. Are you acquainted with the product put up and sold by the California Fig Syrup Co. known as "Syrup of Figs" or "Fig Syrup"? A. I am.

Q. 7. How long have you been acquainted with it?

A. Well, twelve or thirteen years; since it has become known through advertisements.

Q. 8. You have been acquainted with it ever since it became known through advertising? Have you dealt in that product? A. We have.

Q. 9. Do you know whether or not it is a popular production?

A. Yes; I know that it is a very popular preparation.

Q. 10. Do you know whether or not the sales are large?

A. Yes, I know they are very large.

Q. 11. Do you know whether or not it constitutes one of the staple products kept by retail druggists throughout the country?

A. We look upon it as one of the leading proprietary articles.

Q. 12. What can you say in regard to the sales that the house of Redington & Co. has made of this article? Whether they have been extensive or not.

A. They have been very extensive.

Q. 13. For how long?

A. For some years past. We have sold very large quantities of it, up to hundreds of thousands of dollars probably.

Q. 14. Do you know what the reputation of the compound is with the public?

A. I know it is a popular remedy.

Q. 15. Now, prior to the time that your attention was called to this product had you ever heard or known of an article on the market by the name of "Fig Syrup" or "Syrup of Figs"?

A. Not that I remember. I think there was no such preparation on the market at all until this preparation was originated.

Q. 16. Had you ever heard or known of any preparation of food or medicine or anything else prior to that time that was known by the name of "Fig Syrup" or "Syrup of Figs"? A. No, sir.

Q. 17. Was it necessary in your business to inform yourself of the article upon the market and for which there was a demand, and supplied by druggists?

A. I am acquainted with the articles which were dealt in in an extensive way.

Q. 18. Now I will ask you if, as a druggist and from your acquaintance with the business and your acquaintance with the reputation of this preparation of complainant, whether or not this preparation of complainant's has come to be known by the public by the name "Syrup of Figs" or "Fig Syrup"? A. Yes, sir.

Q. 19. It has? A. It has.

Q. 20. Now suppose some other preparation was put upon the market purporting to be a laxative preparation, and named "Syrup of Figs," would that, in your opinion, effect the sale of complainant's article?

(Objected to as incompetent, irrelevant and immaterial, not being a matter for the opinion of the witness.)

A. Yes, if those preparations were pushed to any extent—introduced to the trade.

Q. 21. Now, from your experience in the business, can you say whether or not, if such a preparation was made and marked "Syrup of Figs," and purported to be a laxative preparation, whether that could be palmed off upon unsuspicious customers as the complainant's article?

(The same objection.)

A. I think it might.

Q. 22. What is understood in the trade by the name "Syrup of Figs" or "Fig Syrup"?

A. It would mean relating to this article.

Q. 23. Now, suppose the term is used in the trade "Fig Syrup" or "Syrup of Figs," what is meant?

A. Well, it is a preparation that is manufactured by the California Fig Syrup Co.

Q. 24. Now, in regard to orders from retail druggists; that is to say, where "Fig Syrup" is wanted by your retail customers, in what terms is the order put generally?

A. You mean in what way do the customers order it?

Q. 25. Yes, sir.

A. "Syrup of Figs" usually or "Fig Syrup."

Q. 26. Your customers simply ask for "Syrup of Figs" or "Fig Syrup"?

A. "Syrup of Figs" or "Fig Syrup."

Q. 27. Is there any other preparation known to the trade under the name of "Syrup of Figs" or "Fig Syrup," excepting the complainant's preparation or imitations thereof? A. Not that I know of.

Q. 28. I show you a package marked "Exhibit H," attached to the bill of complaint here, and being the same package referred to in your affidavit on file in this action, and ask you if you have ever seen that before?

A. Either this or a similar package.

Q. 29. Where did you get the package?

A. The preparation was bought from the firm of C. E. Worden & Co. I am not sure about that, whether that was billed by C. E. Worden, or whether it was billed by the San Francisco Fig Syrup Co.

Q. 30. Do you remember making the purchase?

A. I remember that a purchase of this preparation was made.

Q. 31. (By Mr. MILLER.) By you?

A. Not by me personally, but by my instructions.

Q. 32. (By Mr. OLNEY.) Of whom was the purchase made?

(Objected to on the ground that the witness has already testified that the preparation was not made by him, and therefore whatever he says must necessarily be hearsay, and therefore incompetent evidence.)

Q. 33. Of whom was the purchase made?

A. Well, I am not sure, Mr. Olney, whether that was made of the San Francisco Fig Syrup Co. or C. E. Worden & Co.

Q. 34. Do you know of an incorporation or firm doing

business under the name of the San Francisco Fig Syrup Co.? A. I do not.

Q. 35. Mr. Redington, I call your attention to your addavit. Perhaps that will refresh your recollection.

Mr. MILLER.—We object to counsel calling his attention to his affidavit or refreshing his recollection in any way. The witness is fully competent to take care of himself and testify to the facts that he knows.

Q. 36. (By Mr. OLNEY.)—Have you any means of ascertaining now from whom you made the purchase of this package?

Mr. MILLER.—We object to that because the witness has already testified that he did not purchase it himself.

Q. 37. (By Mr. OLNEY.)—Please answer the question.

A. I probably could obtain that information by going through our invoices, as to the party from whom we bought this.

Q. 38. I show you an affidavit in this case made on the twenty-third day of August, 1897, before Donzell Stoney, a notary public, and ask you to look at the bottom of page three and see if that will refresh your recollection as to the purchase of that article.

Mr. MILLER.—We object to the affidavit being shown to the witness on the ground that it is incompetent, irrelevant and immaterial, and it is not proper to coach the witness in this way. The witness has already testified that he did not buy this bottle personally, and whatever therefore he might say in the affidavit to the contrary would not affect the case, and would be incompetent.

Q. 39. (By Mr. OLNEY.)—I call your attention to the last sentence on page 3, and ask you if that will refresh

your memory in regard to the purchase of Exhibit "H."

A. (After examining.) That must have been the fact.

Q. 40. I will ask you if you remember the circumstances under which you came to make the order?

A. Yes. I was requested by Mr. R. E. Queen to send to Clinton E. Worden and purchase one dozen of this preparation manufactured by the San Francisco Syrup of Figs Co.

Q. 41. Did you do so? A. I did.

Q. 42. And is this Exhibit "H" one of the packages purchased in accordance?

A. One of the bottles, or one similar to the bottles that I bought or had bought.

Q. 43. Have you any of the other bottles purchased by you, or packages, at your store? A. Yes.

Q. 44. Now, Mr. Redington, has your firm ever received orders from customers for imitations of the "Fig Syrup"? A. We have.

Q. 45. Have you filled any of those orders?

A. We have.

Q. 46. Where have you got the imitation with which you filled the orders?

A. We bought them in this market.

Q. 47. From whom?

A. From C. E. Worden & Co. is one. We bought them from others.

Q. 48. From whom else? A. F. W. Weeks & Co.

Q. 49. What price did you pay for these packages?

A. I don't remember.

Q. 50. Could you get that invoice and let us have it?

A. I will try to find it, Mr. Olney.

Mr. OLNEY.—With the exception of introducing that invoice if he can find it, my examination is closed.

Cross-Examination.

(By Mr. MILLER.)

X. Q. 1. Mr. Redington, can you identify this particular package, Exhibit "H"? A. I cannot, sir.

X. Q. 2. Can you swear whether you ever saw that identical package before or not?

A. I cannot swear that I have ever seen that identical package. I have seen one similar to it.

X. Q. 3. Can you swear that you bought that identical package from Worden & Co.?

A. Not personally; no, sir.

X. Q. 5. Then what do you mean by asserting in your affidavit that Exhibit "H" was purchased by you from the defendant Clinton E. Worden & Co. on or about the twenty-sixth day of May, 1897?

A. I instructed our buyer to purchase one dozen of this preparation.

X. Q. 6. But I am asking you: you say you instructed your clerk to buy it. Now why do you come into this Court with an affidavit and swear that you yourself bought it on the twenty-sixth day of May, 1897?

A. Well, because to all intents and purposes I did buy it. I instructed our buyer to buy it in the usual course of business, in the same manner as our goods are bought.

X. Q. 7. Who was it you instructed to buy this package? A. A man by the name of McCarthy.

X. Q. 8. Then did you go with him up to Worden's to buy it? A. No, sir.

X. Q. 9. Do you know where he went to buy this medicine?

A. Well, I presume he bought it from Worden.

X. Q. 10. I didn't ask you what you presumed. I asked what you knew.

A. Inasmuch as I received the bill, I suppose it is natural to conclude that it was bought from Worden.

X. Q. 11. I am not asking you what it is natural to conclude or anything of that kind. What I want to know of you is, what you know of the facts: Now you didn't go with this man when he went up to buy this medicine?

A. No, sir.

X. Q. 12. He came back to you with the medicine and a bill? A. Yes, sir.

X. Q. 13. That is all you know about it?

A. That is all I know about it.

X. Q. 14. Now, upon the strength of that, are you willing to swear that you yourself bought this medicine at the time stated? A. I did swear to it.

X. Q. 15. I know you swore to it, and I am trying to find out from you now what explanation you have to make of having sworn in your affidavit that you bought this medicine, and then coming here and not being willing to swear that you did buy it?

A. Well, I did buy it through a representative that I sent to buy those goods, in the same manner that our other goods are bought.

X. Q. 16. How do you know that he bought it from Worden & Co.? A. He produced the bill.

X. Q. 17. Is that the only way you know of it?

A. That is the only way I know of it.

X. Q. 18. To whom was the bill given?

A. To me.

X. Q. 19. To you personally or to the firm of Redington & Co.?

A. By a member of the firm of Redington & Co. it was given to me.

X. Q. 20. Was the bill directed to Redington & Co.?

A. Yes.

X. Q. 21. So that the sale, as a matter of law, was made to Redington & Co.? A. Yes, sir.

X. Q. 22. That is the basis, the whole basis, of your statement that you bought this medicine from Clinton E. Worden & Co.? A. Yes, sir.

X. Q. 23. What day was it that you bought it?

A. I could not tell you.

X. Q. 24. Have you any recollection?

A. No, sir.

X. Q. 25. Why did you buy it?

A. I just told you.

X. Q. 26. What was it?

A. At the request of R. E. Queen.

X. Q. 27. What did Mr. Queen want with it?

A. I don't know.

X. Q. 28. Did he state to you why he wanted you to buy it?

A. No, he didn't make any explanation to me.

X. Q. 29. You knew what he wanted it for, did you not? A. I didn't ask him anything obout it.

X. Q. 30. You have been very rich in presumption and

supposition here. What do you presume or suppose was his object in wanting to buy it?

Mr. OLNEY.—We object to such language being used to the witness, as it is unwarranted by anything that the witness has said or done.

X. Q. 31. (By Mr. MILLER.)—Now, will you answer the question please? A. What was the question?

X. Q. 32. What did you presume was his object in getting it?

A. I presumed that it was to procure evidence against the parties who were putting up this preparation.

X. Q. 33. Evidence for this suit, you mean?

A. Evidence for the same suit.

X. Q. 34. Isn't it a fact that Mr. Queen came down to you and said that Worden was infringing his trademark, and that he wanted you to go up there and buy this medicine, or send up there and buy this medicine from him, so that he could use it in evidence in the suit, or some words to that effect? A. He might have said so.

X. Q. 35. Then that was the object and purpose of making the purchase, was it not?

A. It is not unlikely that that may have been the purpose?

X. Q. 36. Now, you say that this medicine of complainant's has a good reputation and is a meritorious medicine. Do you base that statement upon the fact of the large sales that have been made and the advertising that has been given to it?

A. Mainly; yes, sir.

X. Q. 37. That is generally the way of pushing propri-

etary medicines, isn't it, by making unusual efforts, and advertising and spending a lot of money in that way?

A. Yes, sir.

X. Q. 38. "St. Jacobs Oil" is also a medicine that has a large sale and has got a good reputation, has it not?

A. It is sold very extensively; yes, sir.

X. Q. 39. Is it a valuable remedy?

A. I should so consider it.

X. Q. 40. Is it a proprietary medicine?

A. Yes, sir.

X. Q. 41. Has it a good reputation?

A. So far as I know; yes, sir, it has a good reputation with the trade.

X. Q. 42. It has been advertised about as well as any medicine ever has been, has it not?

A. Well, it has been advertised on a very extensive scale.

X. Q. 43. Do you know the formula by which it is made? A. I do not.

X. Q. 44. Do you know what its constituents are?

A. I do not.

X. Q. 45. You only judge of the fact that it is a good medicine, then, by the reputation which it has, and the extent of its sales, do you? A. Yes, sir.

X. Q. 46. Do you deal in it and sell it? A. We do.

X. Q. 47. Are you familiar with the label of the package that is used by the California Fig Syrup Co. in connection with the medicine?

A. The label of the carton that is used on that bottle, do you mean?

X. Q. 48. Yes, by the complainant. A. Yes, sir.

X. Q. 49. You have known that for some time, have you? A. For some years.

X. Q. 50. Is that well known in the trade?

A. The preparation is very well known.

X. Q. 51. I mean the label.

A. Yes, sir; the label is well known to all druggists.

X. Q. 52. Now, will you please look at the complainant's label which has been put in evidence here, and is marked Exhibit "A," and place it by the side of the Exhibit "H" that you spoke of purchasing?

A. Yes, sir.

X. Q. 53. Now, do you think that a dealer in that medicine would ever take Exhibit "H" for the complainant's medicine? A. No, sir.

X. Q. 54. Why not?

A. Because there is no similarity in the label, and if he bought the imitation he would probably obtain it for less money than the genuine article was sold for. The dealer is acquainted with the various labels under which it is sold.

X. Q. 55. What is the object, if you know, of putting on the complainant's label this picture of a fig branch with figs on it, and the pictures on each end of a young lady gathering figs?

A. I suppose as a trademark.

X. Q. 56. Well, can you give any reason why they selected the fig in preference to anything else as a trademark?

(Objected to as not cross-examination, and as calling

for the opinion of the witness as to the reason of somebody else.)

A. Well, as the preparation is called "Syrup of Figs," I suppose that that cut or picture was used as a trademark to indicate that syrup of figs was used in the compounding of the preparation?

X. Q. 57. Is there a popular impression among people at large that figs have some kind of a laxative property?

A. Yes, sir; there is that impression.

X. Q. 58. How long have you known of the existence of such an impression as that? A. For some years.

X. Q. 59. Can you state what impression would be made on the mind of an ordinary person who knew that figs had laxative properties, or who supposed that figs had laxative properties, by seeing a bottle of laxative medicine labeled "Syrup of Figs," and without knowing actually what its constituents were?

Mr. OLNEY.—We object to that as not proper cross-examination and as asking for the opinion of the witness as to what would be the thoughts or opinions of some third person; the question does not call for anything that would be evidence in any case whatever.

Mr. MILLER.—I will withdraw that question temporarily. You have been in the drug business for thirty years, have you not?

A. Yes, sir; more than that.

X. Q. 61. You have had a great many dealings with people coming in and buying medicine, have you not?

A. Yes, sir.

X. Q. 62. You have a pretty good knowledge of the

way people come in and how they do when they come in to buy a bottle of medicine, have you? A. Yes, sir.

X. Q. 62. They look at the labels, do they not?

A. No, sir.

X. Q. 63. They never look at the labels at all?

A. No, sir; not the buyers that come into our place of business. We are not in the retail business. Our business is wholly wholesale.

X. Q. 65. You have not any retail business?

A. No, sir; not any retail business.

X. Q. 66. But you know the way people generally do in coming into a store to buy medicine, in a retail store? Have you ever had any experience in a retail store?

A. No, sir; I don't know anything about that.

X. Q. 67. You have sufficient ordinary intelligence, have you not, to know how people would act under such circumstances as that, just as anybody else would, whether he is in the drug business or not, haven't you?

Mr. OLNEY.—We object to that on the same ground as above stated, and on the further ground that the question itself shows that it is not a matter for expert testimony; it is for the Court to determine.

X. Q. 68. (By Mr. MILLER.)—I will put the question in this way, Mr. Redington: suppose you wanted a laxative medicine to cure yourself of constipation, and you went into a drugstore and you saw a bottle labeled "Syrup of Figs," and you had never seen or heard of such a medicine before as that, but you knew of the popular impression that figs possessed laxative qualities, now what would be the impression that would be conveyed to your mind under such circumstances as that, when a dealer

handed you a bottle of complainant's medicine marked "Syrup of Figs," and told you it was a good laxative?

(Objected to as not cross-examination, and not related to anything brought out in the examination in chief.)

A. I should think he was giving me what I went in to buy, a bottle of laxative medicine.

X. Q. 69. My question meant, though, what you would conclude, if anything, with regard to the presence or absence of figs in the medicine?

A. If I had looked at it and saw "Syrup of Figs" on the label, I would conclude that there was syrup of figs in it.

X. Q. 70. Well, why would you conclude that?

A. I could not come to any other conclusion. I would conclude that syrup of figs was in it, if I knew nothing about the preparation.

X. Q. 71. I am assuming that you didn't know anything about the preparation. That, you say, would be the conclusion that you would come to under the circumstances? A. Yes, sir.

X. Q. 72. If you were to go into a drugstore and see a bottle labeled "Syrup of Rhubarb," what kind of syrup would you conclude was in that bottle?

A. I would conclude that it was what the label called it, "syrup of rhubarb."

X. Q. 73. If you saw a bottle labeled "Syrup of Orange," would you conclude that it had syrup of orange in it? A. That would be the conclusion; yes, sir.

X. Q. 74. If it was labeled "Syrup of Lemons" would you conclude that it has syrup of lemons in it

A. Yes, sir.

X. Q. 75. That would be the natural conclusion to be drawn from language of that kind on the article itself, would it not? A. From the label; yes, sir.

X. Q. 76. Suppose you went into a store and saw a bottle labeled "Syrup of Orange," and you wanted to buy some syrup of orange, and asked the dealer for it, and he handed you down a bottle, and you bought it and took it home, and found it was not syrup of orange, would you consider that the dealer had perpetrated a fraud on you for selling you something which was not syrup of orange?

Mr. OLNEY.—We object to that question as being an absurdity upon its face, and as incompetent.

A. Yes, sir; I should return it, thinking that he had given me a fraudulent article.

X. Q. 77. Now, if you went into a store and wanted a laxative medicine, and asked for a bottle of "Syrup of Figs," and he was to hand you a bottle labeled "Syrup of Figs," and it had no syrup of figs in it and no juice of the fig in it, would you consider the dealer had perpetrated an imposition on you?

A. I would have no way of determining whether there were any syrup of figs in it or not.

X. Q. 78. You would have to take his word for it?

A. Yes, sir; I would take what the label called for to be "Syrup of Figs."

X. Q. 79. If it turned out when you went home that there was no fig juice in it, and no syrup made from figs in it, then you would be imposed upon without knowing it, would you?

A. If I believed there was syrup of figs in the preparation when I bought it.

X. Q. 80. Well, a man who should see a bottle labeled "Syrup of Figs" would naturally conclude there was syrup of figs in it, would he not?

Mr. OLNEY.—That is objected to as immaterial and irrelevant and not cross-examination, and also because the question to which it relates supposed that he was in want of a laxative medicine and required it as a laxative medicine.)

A. Yes, sir.

X. Q. 81. Do you know what this "Syrup of Figs" of complainant is composed of? A. No, sir.

X. Q. 82. The formula, then, is a secret, I presume, is it? A. Yes, sir.

X. Q. 83. The constituents of it are also secret, are they?

A. I think they are. I know one of the ingredients that goes into it.

X. Q. 84. Which?

A. Senna. I know that senna is used.

X. Q. 85. Senna is the only one that you know of now, is it? A. Yes, sir.

X. Q. 86. The label of complainant's bottle says—no, the wrapper of complainant's medicine says, I believe, that it is composed of senna and aromatics and carminatives.

A. I believe that is the language, as near as I can remember it.

X. Q. 87. Do you know what the aromatics and carminatives are?

A. Mr. Queen has not enlightened me on that.

X. Q. 88. And you have not been able to discover what they are?

A. I have never sought to discover. I never tried it.

X. Q. 89. Have you ever tasted this medicine?

A. No.

X. Q. 90. If it were a fact that in one thousand gallons of medicine there was only one gallon of fig juice, now, as a chemist, can you tell me whether or not the taste of the fig juice in that mixture would be appreciable or could be detected?

Mr. OLNEY.—We object to that as not relating to any inquiry called out by the examination in chief, not proper cross-examination, assuming a fact is not in accordance with the testimony offered in the case.

X. Q. 91. (By Mr. MILLER.)—Will you answer the question, please? A. I don't know.

X. Q. 92. Is it your idea that buyers of this "Syrup of Figs" would be largely influenced in buying it by the fact that there is popular impression that figs have laxative properties? I refer to those people who don't know the actual constituents of the medicine, but are merely buying it because it is a well advertised laxative?

A. Well, I think many would buy it from the fact that they might consider that syrup of figs was in it. A good many would buy it because it is an extensively advertised preparation, and they come across it and buy it.

X. Q. 93. Is it your experience in the drug business that some people buy medicine simply because it is extensively advertised?

A. I think that is the way most our medicines are sold, through extensive advertising.

X. Q. 94. Is it not a fact that the name here on this label "Syrup of Figs," together with the various pictures that have been called to your attention, representing figs, would induce people to purchase the medicine under the belief that it was prepared in some way from fig juice?

Mr. OLNEY.—We object to that as incompetent, irrelevant and immaterial, and not proper cross-examination, and as calling for the opinion of the witness in regard to a matter on which he was not examined, and as calling for an opinion without a statement of facts.

A. They would probably believe, many of them would believe that syrup of figs was in the preparation.

X. Q. 95. (By Mr. MILLER.)—Did you know Mr. Queen about the time he was making this medicine up in Reno, Nevada? A. Yes, sir.

X. Q. 96. Were you connected with him then?

A. What do you mean by "connected," Mr. Miller?

X. Q. 97. Well, in any of that business, or otherwise?

A. Well, I sold him goods at that time.

X. Q. 98. Were you acquainted with him about the time he selected this name "Syrup of Figs"?

A. That I don't know when the name was selected.

X. Q. 99. Can you give any reason why the name "Syrup of Figs" was selected as this trademark, which he has prepared, for designating and describing his medicine?

Mr. OLNEY.—We object to that as immaterial and irrelevant, and not proper cross-examination, and as calling for the opinion of the witness on a matter with regard to which it is impossible for him to know anything about.

A. I don't know why Mr. Queen selected that as a trademark.

X. Q. 100. (By Mr. MILLER.)—You have sold large quantities of this "Syrup of Figs" for complainant, have you not? A. Yes, sir.

X. Q. 101. For quite a number of years?

A. For ten years or more.

X. Q. 102. Have you any interest in the California Fig Syrup Company?

A. No, sir; except as buying and selling goods as any merchant.

X. Q. 103. You are not a stockholder in it?

A. No.

X. Q. 104. Have you ever sold any of Frederick Stearns & Co.'s goods?

A. Not that I know of. I think not.

X. Q. 105. You have never sold any of their fig syrup then? A. No, sir; I have never seen it.

X. Q. 106. Is it not a fact that there are very large numbers of fig syrups on the market at the present day?

A. I don't know of any, Mr. Miller, that are now being sold in this market, except the syrup that Mr. Michaels referred to, "Garfield Fig Syrup."

X. Q. 107. Who is this other man you say that made fig syrup here in this city besides Worden?

A. A party by the name of Week.

X. Q. 108. What is the name of his fig syrup?

A. "Fig Syrup," I think.

X. Q. 109. Is it customary in the drug busines, Mr. Redington, for a manufacturer to put out a medicine or preparation, and call it by a name which indicates that

it is composed of certain substances, when it is not composed of those substances?

A. No; I don't understand it is the custom.

X. Q. 110. Isn't it more a general custom to give it a name which shows that it is composed of certain substances?

A. No, I think not all. I think they simply look out for a name like "Kidney Cure," or "Sarsaparilla," or "Cough Cure," or "Blood Purifier."

X. Q. 111. Could you make a pure syrup from figs in just the same way as you would make a syrup from any other fruits?

A. I don't know; I am not a pharmacist. I could not tell you, Mr. Miller.

X. Q. 112. (Mr. ROWE.)—Mr. Redington, what did you mean by this expression in your affidavit, "I regard the name 'Syrup of Figs' or 'Fig Syrup,' as applied to that liquid, laxative, medical preparation as a name for a liquid laxative, a popular suggestion or a pleasant suggestion"? What did you mean by the phrase "popular suggestion or pleasant suggestion"?

A. Because it is the prevailing opinion that figs are laxative, and it was evidently to convey the impression that there were figs in that preparation.

X. Q. 113. You followed that by saying that it is deceptive? What do you mean by that expression?

A. Well, not deceptive, because I took it for granted that there are figs in that preparation.

X. Q. 114. Then you don't know whether it is deceptive or not as regards the public at large in purchasing this article? A. No, sir, I don't know.

Examination in Chief of

W. S. DREYPOLCHER, a witness called on behalf of complainant; sworn.

(By Mr. OLNEY.)

Q. 1. What is your age, Mr. Dreypolcher?

A. Thirty-nine.

Q. 2. Where do you live? A. San Rafael.

Q. 3. Were you living in this city on the eighteenth day of May, last?

A. No, sir; I was living in San Rafael.

Q. 4. What is your business?

A. Advertising agent.

Q. 5. Do you know the drugstore that has the sign over it, "Schmidt's Pharmacy," situated on the southeast corner of Sacramento and Kearny streets?

A. Yes, sir.

Q. 6. What is the sign on the drugstore, do you know?

A. Well, I could not state what the whole sign is. I know that there is a sign "Schmidt's."

Q. 7. Were you in that store on the eighteenth day of May, 1897? A. Yes, sir.

Q. 8. I show you a package marked "Exhibit T—W. S. Dreypolcher," and ask you if you have ever seen that package before? A. Yes, sir.

Q. 9. Where did you first see it?

A. At Schmidt's pharmacy, at the corner of Kearny and Sacramento streets.

Q. 10. Is this endorsement on the back of it in your handwriting, "Bought by W. S. Dreypolcher, May 18,

Schmidt's Pharmacy, southeast corner of Sacramento and Kearny streets"? A. Yes, sir.

Q. 11. Now will you state what took place when you bought that package.

A. I entered the store and asked for a package of "Syrup of Figs." He said "A small package?" and I said "Yes," and he wrapped up this package and gave it to me. As he handed it to me, I said "Is that syrup of figs made by the California Fig Syrup Company"?

Mr. MILLER.—We object to any conversation of this kind on the ground that the defendants were not there, or any of them, and they are not bound by any conversation that occurred between him and a third person.

Q. 12. (By Mr. OLNEY.)—Well, go on now and state what took place.

A. I said "Is that syrup of figs manufactured by the California Fig Syrup Company?" and he says "Yes," and he walked around behind (he was behind the counter), he walked around to another counter and he says: "I guess that is made in Louisville," and I says "That is what I wanted, 'Syrup of Figs' made by the California Fig Syrup Co." Then another man came up and says: "That is right; that is the stuff you want." That is the words he used, "That is the stuff you want. That is made by the California Fig Syrup Co.," and I says "Right here in town?" and he says "Yes; they have got a place out on Hayes street," and I took my package.

Q. 13. What did you pay for it?

A. Twenty-five cents.

Mr. MILLER.—I move to strike out the answer on the

ground that the testimony is entirely hearsay and utterly incompetent.

Q. 14. (By Mr. OLNEY.)—What connection, if any, did the man with whom you first talked have with the store? A. Well, he seemed to be clerk there.

Mr. MILLER.—I move to strike the answer out on the ground that the witness does not know. He states that he seemed to be a clerk there.

The WITNESS.—Well, he was a clerk.

Q. 15. (By Mr. OLNEY.)—Was there anybody else in charge of the store at that time?

A. I did not see anybody else but these two men.

Q. 16. Now, this man that came in and spoke, did you see anything to indicate what his relation was to the store?

Mr. MILLER.—We object to that because it is not calling for a fact, but calling for a supposition.

A. I supposed that he was connected with it, being behind the counter.

Q. 17. (By Mr. OLNEY.)—Did he go behind the counter? A. He was behind the counter.

Q. 18. And he was there all the time?

A. He was there all the time.

Mr. MILLER.—I notify counsel that I shall object to this deposition, on the ground indicated in our objections heretofore taken, namely, that the question is incompetent, irrelevant and immaterial. We have no question on cross-examination.

Mr. OLNEY.—Right in this connection, I offer this package in evidence, and ask that it be marked Exhibit "U."

Mr. MILLER.—We object to that package as incompetent, irrelevant and immaterial, on the same ground that we objected to the testimony of the witness.

(Marked "Complainant's Exhibit U.")

Examination in Chief of

A. B. SMITH, a witness called on behalf of complainant; sworn.

(By Mr. OLNEY.)

Q. 1. What is your name? A. A. B. Smith.

Q. 2. What is your age? A. Thirty-five.

Q. 3. Your residence? A. San Francisco.

Q. 4. I show you a package which has on the back of it these words "May 14, 1897, 3 P. M.. Paid twenty-five cents for this bottle at drugstore, southeast corner of Kearny and Sacramento streets, S. F., Calif. Small man, wearing pointed beard, sold to me." Signed "A. B. Smith. Exhibit S. A. B. Smith." I ask you if you have ever seen that before?

A. Yes, sir; I wrote that on there.

Q. 5. Now, will you state the circumstances under which you came into possession of that package?

A. I went into the drugstore, known as Schmidt's or Val Schmidt's—on the window was "Lucius Little, proprietor"—and asked for a bottle of "Syrup of Figs" from a short man, with gray hair and with a pointed beard, and he stepped around the counter, and got this bottle from among other bottles upon the shelf and handed it to me, and I asked him how much, and he said twenty-

five cents. I asked him where it was made and by whom. He said by the California Fig Syrup Co.

Q. 6. Did he mention the street?

A. I wanted to know where I could find them, because I wanted to see them, and he said—

Mr. MILLER (Interrupting).—We object to anything that the man said, and we interpose that objection to the testimony which the witness has heretofore given as well as to that which he is giving now, on the ground that it is incompetent, irrelevant and immaterial, and that the conversation was not had in the presence of the defendants or any of them, and therefore is not binding upon them.

Q. 7. (By Mr. OLNEY.)—Go on, now, with the conversation.

A. He told me that it was on Hayes street some place. I asked him if he didn't know the number. He said no, but that he thought it was in the three hundred block. I asked him if there was any other offices or branches. He said there was a branch in Louisville, Kentucky, and one in Chicago, and one in New York.

Q. 8. What did you do then?

A. I took the bottle and paid for it and went out. I took it away. I asked him at the same time if he didn't spend a good deal of money for advertising, and my recollection is that he said, "Yes, they do. They are big advertisers."

Q. 9. Was he the only one there in the store?

A. No, Mr. Little was behind the counter also.

Q. 10. Do you know Mr. Little? A. Yes, sir.

Cross-Examination.

(By Mr. MILLER.)

X. Q. 1. What was this man's name who said these things to you?

A. I don't know the man's name that said them.

X. Q. 2. Have you ever seen him before?

A. Not to my knowledge.

X. Q. 3. How did you happen to go there to buy this medicine? A. By request of Mr. Queen.

X. Q. 4. You didn't go there of your own accord, then, to buy it for the purpose of using it as a medicine?

A. No, I didn't intend to use this particular bottle.

X. Q. 5. What did Mr. Queen request you to do in that regard?

A. He asked me to buy it and make this notice on it. That is, he asked me to make the written memorandum of it so that I would recognize it.

X. Q. 6. Did he tell you for what purpose he wanted you to buy that?

A. He told me that it was for the purpose of that this was an infringement on his remedy.

X. Q. 7. And that he wanted the bottle as evidence of that fact? A. Yes, sir.

X. Q. 8. So when you went in there and asked the clerk for a bottle of "Fig Syrup," and he handed this out to you, when you looked that it you saw that it was not Mr. Queen's preparation, did you?

A. No, sir; I did not.

X. Q. 9. Were you familiar with Mr. Queen's preparation?

A. I have heard of it, but I don't know that I ever got it in a package like that. I got it in a bottle, in a naked bottle. I should judge, by looking at that and knowing that Mr. Queen has a branch of a figtree on his label, I would have taken it for his remedy.

X. Q. 10. What is your connection with Mr. Queen?

A. I do business, sell him goods occasionally, and I have been a friend of his for quite a number of years.

X. Q. 11. What is your business?

A. Furniture business.

X. Q. 12. You say you sell goods for him?

A. To him, now and then, whenever he patronizes me, like any one else.

X. Q. 13. That is, he is one of your customers, is he?

A. Yes.

X. Q. 14. Where is your place of business?

A. 128-132 Ellis street.

X. Q. 15. How long have you known Mr. Queen?

A. About twenty years.

X. Q. 16. You have been a friend of his and he requested you to go and buy this thing for him, purchase this bottle, did he? A. He certainly did.

X. Q. 17. And you afterward took the bottle over to Mr. Queen, did you? A. To Mr. Olney.

X. Q. 18. His attorney? A. Yes, sir.

X. Q. 19. For the purpose of being used as evidence in this case, I presume?

A. Well, I presume so, I don't know. I presume that. I don't know what case or any case.

X. Q. 20. The situation was just about this, was it not—Mr. Queen said to you that they were infringing his

preparation, and that they were selling the infringement down at that drugstore, and he wanted you to go down there and buy a bottle of it, so as to use it as evidence in this case, and you went down there and asked for a bottle of "Syrup of Figs"?

A. I went down there and asked for a bottle of "Syrup of Figs," and they gave me that bottle.

X. Q. 21. And they gave you that bottle in that way, and he asked you to turn it over to him for purposes of evidence in this case?

A. He didn't ask me to turn it over to him. He asked me to give it to Mr. Olney, with my affidavit.

X. Q. 22. He asked you to turn it over to his attorney, did he? A. Yes, sir.

X. Q. 23. What did you say? Did you do it then?

A. I took it to Mr. Olney's office on the fourteenth day of May, 1897.

X. Q. 24. What day was that?

A. May 14, 1897.

Mr. MILLER.—I notify the counsel that I shall move to strike out the deposition of this witness, on the same ground that I interposed to the deposition of Mr. Dreypolcher.

Mr. OLNEY.—I offer this package in evidence, and ask that it be marked Exhibit "V."

Mr. MILLER.—We object to that as incompetent, irrelevant and immaterial on the same grounds stated, and shall include it in the motion to strike out.

(Marked "Complainant's Exhibit V.")

(At the hour of 12:30, P. M., a recess was had until 2 P. M., when proceedings were had as follows:)

Examination in Chief of

LOUIS T. QUEEN, a witness called on behalf of complainant; sworn.

(By Mr. OLNEY.)

Q. 1. What is your age? A. Thirty-three.

Q. 2. What is your business?

A. I am the superintendent of the manufacturing department of the California Fig Syrup Co.

Q. 3. How long have you occupied that position?

A. About twelve years.

Q. 4. That would be since 1886?

A. Since 1886, yes, sir.

Q. 5. Does the California Fig Syrup Co. use any figs in the preparation of its medicine, known as "Syrup of Figs"? If so, what quantities?

A. Yes, they have used them ever since I have been there, and in the proportion of ten pounds to one hundred gallons.

Q. 6. Has that been the invariable custom?

A. Yes, sir, the invariable custom.

Cross-Examination.

(By Mr. MILLER.)

X. Q. 1. How do you prepare the figs, Mr. Queen, for use in your preparation?

A. Well, we cut them up and steep them in hot water, dissolve the soluble substance and press them out.

X. Q. 2. Then the residuum that is left is put into the medicine, I presume, is it? A. Yes, sir.

X. Q. 3. What parts of the fig do you dissolve in the water?

A. Well, the soluble parts—the sugar.

X. Q. 4. What I wanted to get at is, what are the soluble parts in the fig?

A. Well, there is an amount of sugar and mucilage contained in the fig.

X. Q. 5. Do you use the dried figs or the fresh figs?

A. The dried figs.

X. Q. 6. Where do you procure those figs from?

A. From wholesale houses in this city.

X. Q. 7. I understand you chop those up fine first and then put them in hot water? A. Yes, sir.

X. Q. 8. Do you put them in a press of any kind, so as to express the juice out of them?

A. Yes, sir.

X. Q. 9. And this juice that is expressed out of them in that way is put into the medicine, is it?

A. Yes, sir.

X. Q. 10. If you take, say one hundred pounds of dried figs in that way and prepare them, how much do you have left of the expressed substance?

A. Well, if it was evaporated down, there would be about sixty-five or seventy pounds in that preparation.

X. Q. 11. So that makes about sixty-five or seventy per cent then of the figs that go in? A. Yes, sir.

X. Q. 12. Is that in the form of a sugary liquid?

A. That is about the consistency of syrup, a thin syrup. Of course, this hot water makes it of the consistency of thin syrup.

X. Q. 13. The mixture that is made of hot water and the substance that is expressed out of the fig is a kind of a syrupy liquid, is it? A. Yes, sir.

X. Q. 14. A kind of sweet sugar, is it not?

A. Yes, sir; sweet and pleasant.

X. Q. 15. You have tasted it? A. Yes.

X. Q. 16. What does it taste like?

A. Well, it tastes very pleasant, something like flavored syrup, the flavor of figs.

X. Q. 17. About the same as water and sugar mixed together?

A. Yes, only it is flavored; it has the flavor of the figs.

X. Q. 18. Now, you take that matter then, thus produced, and put it in with the other substance in the medicine, do you? A. Yes, sir.

X. Q. 19. From ten pounds of the figs in the dried state, say, how many gallons of this syrup would you produce?

A. About six gallons.

X. Q. 20. You would then have six gallons of the fig syrup and one hundred gallons of the mixture, would you?

A. Yes, sir.

X. Q. 21. That would be about six per cent of the figs, would it?

A. It would be about six pounds of solid substance evaporated down. That is, five or six—I don't know exactly; about of the consistency of jelly.

X. Q. 22. What would be the consistency of jelly?

A. Well, the fig paste.

X. Q. 23. Then you put it into that form, do you?

A. No, sir; we have it more in a liquid form.

X. Q. 24. How do you get it in a liquid form?

A. By adding hot water, pressing it out. Then we generally evaporate it down to—

X. Q. 25. (Interrupting.)—If I understand you, in the first place you take the figs and chop them up fine, and put them in a press and squeeze them out as much as you can?

A. After adding hot water to dissolve the soluble substance.

X. Q. 26. You first chop them up, mix them with hot water and put them in a press? A. Yes, sir.

X. Q. 27. And then press out all you can by that process? A. Yes, sir.

X. Q. 28. And the substance that you get from that process, did you say was in a kind of jelly or paste?

A. No, in a thin, syrupy form.

X. Q. 29. A thin, syrupy liquid? A. Yes, sir.

X. Q. 30. And that is the fig syrup which you put into the medicine, is it? A. Yes, sir.

X. Q. 31. Now, how long have you known of a fig syrup being produced in that way; that is, by taking the figs and chopping them up and mixing them with water, and putting them in a press and extracting all the substance out of them that you can?

A. Well, just since I have been working for the company—twelve years.

X. Q. 32. Did you ever see any other fruit or substance tried in that way? A. No, sir.

X. Q. 33. Did you ever take prunes and chop them up fine, and mix them with water and put them in a press and extract the juice out of them?

A. No, I have not.

X. Q. 34. You never tried that with any other fruit either, did you? A. No, sir.

X. Q. 35. Now, you put other things in that medicine also to give it a taste, do you?

Mr. OLNEY.—I object to that as incompetent, irrelevant and immaterial, and not cross-examination. I have only asked him in regard to one thing.

A. Yes, sir.

X. Q. 36. (By Mr. MILLER.)—I notice that the labels say that you put into it aromatics and carminatives. That is correct, is it?

Mr. OLNEY.—We object to that question as incompetent, irrelevant and immaterial, and not proper cross-examination. I will state here, I have no objection to counsel making the witness his own, but I am going to protest and insist, when his testimony is read in Court, that those answers that have been called out not on proper cross-examination shall be deemed to be the testimony of the other side.

X. Q. 37. (By Mr. MILLER.)—That is a correct statement on those labels, is it?

Mr. OLNEY.—We object on the same ground and give the same notice.

X. Q. 38. (By Mr. MILLER.)—Will you answer the question, please?

A. I decline to answer, sir.

X. Q. 39. (By Mr. OLNEY.)—You can answer that question, if you know.

A. As far as I know, it is; yes, sir.

X. Q. 40. (By Mr. MILLER.)—What do you mean in pharmacy by the expression "Carminatives"?

Mr. OLNEY.—We object to that question on the same ground, and notify counsel that if the witness answers these questions upon his demand, that those answers must be deemed his testimony.

X. Q. 41. (By Mr. MILLER.)—Now, will you answer that question, please? A. I decline.

X. Q. 42. On what ground do you decline to answer that question?

A. On the ground that it would be betraying a trade secret in stating the testimony.

X. Q. 43. I am not asking you to disclose any trade secret. I have asked you what is meant by the expression, "Carminatives," which is referred to on your label. Can you answer that question?

(The same objection.)

X. Q. 44. In the first place, I ask you, do you know? You are not disclosing any trade secret by answering that question.

Mr. OLNEY.—That is objected on the same ground.

X. Q. 45. (By Mr. MILLER.)—Will you answer that question? A. No, sir.

X. Q. 46. On what ground do you decline to answer that question?

A. Well, I can't explain it very well.

Q. 47. Have you been instructed by anyone before you came to give your testimony to decline to answer any questions, or to answer no questions relating to this matter? A. No, sir.

X. Q. 48. Then, why do you decline to answer this question? A. Well, I can't explain it very well.

X. Q. 49. All that you know about it is that you decline to answer the question? That is all?

A I don't know.

X. Q. 50. Do you know anything about this stuff called "Syrup of Figs," anyway? A. I do.

X. Q. 51. You know all about how it is manufactured, do you? A. Yes, sir.

X. Q. 52. You know what is put in it, do you?

A. Yes, sir.

X. Q. 53. Do you put any strychnine in it?

Mr. OLNEY.—I instruct you to decline to answer that question. A. I decline to answer.

X. Q. 54. (By Mr. MILLER.)—On what ground do you decline to answer that question?

A. Well, I am instructed to decline, by counsel.

X. Q. 55. What do you mean by the word "Aromatics"? A. Pleasant—

Mr. OLNEY (Interrupting).—Wait a moment. I instruct the witness that he can do just as he pleases about declining to answer that question. It don't appear that the witness has used the word "Aromatics" at all.

X. Q. 56. (By Mr. MILLER.)—Will you answer that question? A. No, sir.

X. Q. 57. Why wont you answer that question?

A. I am instructed by counsel that I have a right to decline.

X. Q. 58. I know counsel has instructed you to that effect, but I want to know why it is you do decline. That is all I want to know. Will you answer that question?

A. What was the question?

Mr. OLNEY.—We object on the ground that it is not cross-examination, and on the further ground that the witness has not used the word "Aromatics."

X. Q. 59. (By Mr. MILLER.)—Well, are you going to answer the question or not? A. No, sir.

X. Q. 60. You have seen these advertisements of complainant, have you not, in which it is stated that their compound consists of senna and certain aromatics and carminatives, together with white sugar? You have seen those advertisements?

A. I have seen such advertisements.

X. Q. 61. Now, I was referring to the expressions used in those advertisements, some of which have been offered in evidence here. Is it not a fact that the aromatics therein referred to, are put in for the purpose of giving a pleasant flavor or taste to the syrup of figs?

Mr. OLNEY.—We object to that as irrelevant and immaterial, and not cross-examination, and instruct the witness that he can answer the question or not, just as he sees fit.

X. Q. 62. (By Mr. MILLER.)—Now, then, will you answer that question? A. No, I decline.

Mr. OLNEY.—I object to that question and instruct the witness not to answer.

X. Q. 63. What aromatics are put in the medicine?

A. I decline to answer.

X. Q. 64. (By Mr. MILLER.)—What carminatives are put into the medicine?

Mr. OLNEY.—I make the same objection and give the same instruction.

A. I decline to answer.

X. Q. 65. (By Mr. MILLER.)—Is it a fact that the quantity of figs put into this medicine is sufficient to give the medicine a fig taste?

Mr. OLNEY.—I object to that as incompetent, irrelevant and immaterial, and not cross-examination, and as calling for the opinion of the witness on a matter that he has not testified to in chief, and about which he may or may not know. (To the witness.) Now, you can go ahead and answer that question.

A. I have never tried it without the figs, so I don't know.

X. Q. 66. (By Mr. MILLER.)—Have you ever tried it with the figs? A. I have.

X. Q. 67. Did you taste any fig in it?

A. I have not tried it alone with the medicine; I have tried it in the general combination.

X. Q. 68. Well, can you detect a fig taste in a bottle of medicine as it is now? A. I don't know.

X. Q. 69. Well, you have tasted the medicine, haven't you?

A. I have tasted the medicine. It tasted very much like figs.

X. Q. 70. Did you detect a fig in the medicine?

A. It tasted very much like it. I could not state that it was the figs.

X. Q. 71. When you use this expression "Syrup of Figs" on your medicine, you intend to indicate, do you not, that there is the juice or the extract or syrup made from figs, contained in it?

Mr. OLNEY.—We object to that on the ground that it is immaterial, irrelevant and incompetent, and not cross-examination, and as assuming as a fact that the witness has not testified to, namely, that he used the term "Syrup of Figs." (To the witness.) You need not answer that question unless you see fit.

X. Q. 72. (By Mr. MILLER.)—Will you answer that question? A. I decline to answer.

X. Q. 73. Does not the expression, "Syrup of Figs," mean and indicate that the medicine contains a syrup, made from figs or some extract from the fig?

Mr. OLNEY.—I make the same objection, and instruct the witness not to answer.

X. Q. 74. (By Mr. MILLER.)—Will you answer that question? A. I will not answer.

X. Q. 75. Do you know anything about putting the labels on this medicine? Do you have anything to do with them? A. Sometimes I do.

X. Q. 76. What do you have to do in this regard?

A. Well, I generally look after the work, and occasionally I do it myself.

X. Q. 77. You are the superintendent of the factory, are you?

A. I am the superintendent of the medicine room, the manufacturing department.

X. Q. 78. Now, when you use these labels containing the expression "Syrup of Figs" on them, what impres-

sion do you intend to convey to the purchasers of the article?

Mr. OLNEY.—We make the same objection, and instruct the witness that he need not answer.

A. I decline to answer.

X. Q. 79. You notice on these labels, do you not, some pictures representing—one picture on the front of the label, and another picture on each end, do you not?

A. Yes, sir.

X. Q. 80. What is that picture of figs on the label represent?

Mr. OLNEY.—I instruct you that that is not proper cross-examination, and you can decline to answer.

A. I decline to answer.

X. Q. 81. (By Mr. MILLER.)—What do the pictures on the end of the boxes represent?

Mr. OLNEY.—I give you the same instruction with regard to that.

A. I decline to answer.

X. Q. 82. Do you know why those pictures are put on there? A. I do not.

X. Q. 83. Do you know what impression they are intended to convey to purchasers?

Mr. OLNEY.—I object to that and instruct you not to answer. A. I do not.

X. Q. 84. (By Mr. MILLER.)—Have you ever heard of the fact that figs are laxative in their properties?

Mr. OLNEY.—We make the same objection to that question; it is immaterial, irrelevant and not cross-examination.

A. I decline to answer.

X. Q. 85. (By Mr. MILLER.—Why do you put any figs in this medicine?

Mr. OLNEY.—I object to that as not proper cross-examination, and instruct the witness to decline to answer.

A. I decline to answer.

X. Q. 86. (By Mr. MILLER.)—Why don't you put more figs in the medicine than you do?

A. I decline to answer.

X. Q. 87. Why don't you put less figs in it?

A. I decline to answer.

X. Q. 88. Why don't you make it without any figs?

A. I decline to answer.

X. Q. 89. Would not the medicine be just as good without figs as it is with them?

A. I decline to answer.

X. Q. 90. Do you know whether it would be just as good without them as with them? A. I do not.

X. Q. 91. Would not the medicine be just as good if you put so much honey in it, instead of putting this fig juice in it? A. I decline to answer.

X. Q. 92. If you would put just so much syrup of any other kind, instead of fig juice, would not the medicine be just as good?

A. I decline to answer.

X. Q. 93. Is it not a fact that sometimes you make this medicine without any figs in it?

A. Not to my knowledge.

X. Q. 94. Well, isn't it a fact that it is known around the manufactory that sometimes it is made without any figs in it at all? A. No, sir; it is not.

X. Q. 95. Haven't you known of its being manufactured without any figs in it?

A. Never, that I remember of.

X. Q. 96. Who else manufactures it besides yourself?

A. Well, Mr. J. B. Queen has had charge at times.

X. Q. 97. And who else?

A. He has had main charge of it when I was not here; while I was away at the eastern factory.

X. Q. 98. Now, isn't it a fact that on one or two occasions, or on some occasions when you could not get the figs handy, that you made up batches of the medicine without figs? A. Not that I remember of.

X. Q. 99. Isn't it a fact, that might have been done without your knowledge?

A. It might have been done at the eastern factory, when I was not there, as far as I know. I don't know that it was done.

X. Q. 100. If I were to show you a bottle labeled, "Syrup of Rhubarb,' what would you suppose were the constituents in that?

Mr. OLNEY.—We object to that question on the same grounds, and instruct the witness that he may decline to answer.

A. I decline to answer.

X. Q. 101. (By Mr. MILLER.)—Did you ever hear of the syrup of rhubarb?

(The same objection.)

A. I decline to answer.

X. Q. 102. Did you ever hear of syrup of ipecac?

A. I decline to answer.

X. Q. 103. Did you ever hear of syrup of orange?

A. I decline to answer.

X. Q. 104. If I were to hand you a bottle, labeled "Syrup of Orange," what would you suppose were the constituents of it?

Mr. OLNEY.—I make the same objection. You may decline to answer any such foolish questions.

A. I decline to answer.

X. Q. 105. (By Mr. MILLER.)—Has there been any change in the formula for making this medicine since you started on it? A. I decline to answer.

X. Q. 106. You made it according to a certain formula when you started in 1886, did you not? A. I did.

X. Q. 107. Have you changed that formula since?

Mr. OLNEY.—You are not required to answer that question.

A. I decline to answer.

X. Q. 108. Will you state whether or not you have changed the proportion of the figs put into the medicine since you began to manufacture it in 1886?

A. No, sir; we have not.

X. Q. 109. In other words, you put in the same proportion of figs now that you did in 1886, when you began the manufacture of it, do you?

A. As near as I remember, we do.

X. Q. 110. Well, you ought to know. You are the one who makes it. I want to know the fact.

A. Shall I answer.

Mr. OLNEY.—Certainly, that is a proper question.

A. Well, we have not changed.

X. Q. 111. (By Mr. MILLER.)—Why did you hesitate to answer it?

A. I didn't know but what possibly I had forgotten some change that had been made. I don't remember of any.

X. Q. 112. Now, isn't it a fact that there was a change? A. Not that I remember.

X. Q. 113. Well, do you testify positively that there was no change?

A. No change, as far as I can remember.

X. Q. 114. Isn't it a fact that in this medicine there is only one gallon of the extract or juice of the fig to a thousand gallons of the medicine?

A. No, it is not a fact.

X. Q. 115. There is more than that, is there?

A. There is more than that.

X. Q. 116. How much more, or how much is it, how many gallons of fig juice are there in a thousand gallons of the medicine?

A. In a thousand gallons there is, I should judge, about seventy-five gallons.

X. Q. 117. Now, that proportion has been preserved ever since 1886, has it not? A. Yes, sir.

X. Q. 118. And you have not changed it since that?

A. No.

X. Q. 119. Now, in a hundred gallons of this medicine how many gallons of it is this syrup of figs?

A. About seven and one-half or eight gallons; something like that.

X. Q. 120. So that would make it from seven and a half to eight per cent, would it not?

A. I never figured it down that closely.

X. Q. 121. Is that amount of fig juice or syrup of figs,

or whatever you call it, sufficient to give the mixture a fig taste? A. I should think so.

X. Q. 122. (By Mr. ROWE.)—You stated the preparation of figs as one of the constituent elements of this preparation. Are there any other ingredients at all in it?

Mr. OLNEY.—I instruct you to decline to answer.

X. Q. 123. (By Mr. ROWE.)—You stated one of the ingredients. I think that is a proper question. I don't ask you what the others are.

Mr. OLNEY.—Oh, well, I don't object to that.

X. Q. 124. (By Mr. ROWE.)—Is there any other ingredient besides syrup of figs? A. There is.

X. Q. 125. You are familiar with that advertisement, are you, Exhibit "P"?

A Yes, sir; I have seen the advertisement.

X. Q. 126. Is there any ingredient or constituent element of this preparation that means what is stated in this advertisement as "our method of so extracting the laxative properties of senna, without retaining the griping principle?"

Mr. OLNEY.—Do you intend to follow that up by asking what the articles are?

Mr. ROWE.—I do not attempt to lay any foundation to secure the trade secret.

Mr. OLNEY.—With that understanding, I instruct the witness to answer the question. In that connection, I would state to the witness that if he does not know he should so say.

A. I don't know.

X. Q. 127. (By Mr. ROWE.)—You don't know any in-

gredient of this medicine which counteracts the griping tendency or principle of senna? A. I don't know.

X. Q. 128. Any ingredient that was put in for that purpose? A. I don't know.

X. Q. 129. You are familiar with that package, Exhibit "A," marked in the—

A. (Interrupting.)—Yes, sir.

X. Q. 130. Now, it states on this wrapper that the juice of figs in the combination is to promote the pleasant taste. Is that a fact?

Mr. OLNEY.—I instruct you to decline to answer the question.

X. Q. 131. (By Mr. MILLER.)—Do you or not know that to be fact? A. I decline to answer.

X. Q. 132. Do you, or do you not, know whether the juice of figs is in the combination, for the purpose of counteracting the griping principle or the acting principle of senna?

Mr. OLNEY.—I instruct the witness not to answer the question, unless counsel purposes to make the witness his own witness.

X. Q. 133. (By Mr. MILLER.)—Do you or do you not know whether any carminatives or aromatics are used in this preparation for the purpose of counteracting the griping property of the ingredient senna?

A. I decline to answer.

X. Q. 134. Do you or not know whether either one or the other, that is, the juice of fig of the one-hundredth part, or the carminatives and aromatics alone, would be sufficient to counteract the griping property of senna?

A. I don't know.

X. Q. 135. Do you or not know whether either one or the other would be sufficient to counteract the unpleasant taste of the other ingredients, so as to promote a pleasant taste? A. I decline to answer.

Mr. MILLER.—We give notice now, that at the proper time we shall move to suppress the deposition of this witness, on the ground that he has refused to submit himself to proper cross-examination.

Mr. OLNEY.—I shall be surprised if we ever hear of that motion again.

Further hearing adjourned, subject to notice.

Monday, Dec. 19, 10 A. M.

Counsel Appearing:

For complainant: Warren Olney, Esq.,

For respondents: John H. Miller Esq., and Purcell Rowe, Esq.

Examination in Chief of

CHARLES CURTIS WADSWORTH, M. D., a witness called on behalf of respondents; sworn.

(By the EXAMINER.)

Q. 1. What is your full name?

A. Charles Curtis Wadsworth.

Q. 2. What is your age, residence and occupation?

A. I am forty-nine years old, physician, I reside at 1104 Van Ness avenue.

Q. 3. (By Mr. MILLER.)—You are practicing your profession in this city, doctor? A. Yes, sir.

Q. 4. How long have you been practicing your profession? A. In this city?

Q. 5. Yes, sir.

A. The better part of the last twenty-three years, I think.

Q. 6. Are you connected with any medical society of any kind here? A. Yes, sir.

Q. 7. What society

A. The County Medical Society.

Q. 8. In what capacity? A. Simply as a member.

Q. 9. You are a graduate of a regular medical institution, are you? A. I am.

Q. 10. What place? What university?

A. Wooster, Cleveland, O; the medical department; Cleveland, O.

Q. 11. Are you familiar with any popular impression among people at large, regarding the laxative quality of figs?

A. I think that there is a general impression among people that they are laxative.

Q. 12. How long have you known of such a popular impression as that?

A. Oh, I think that would be difficult to answer; for some years, probably.

Q. 13. It is quite an old impression, isn't it?

A. It is an old impression, I think.

Q. 14. You may state what you know in regard to the laxative quality of figs as compared with other fruits.

A. Well, they are popularly supposed to be laxative, and people very frequently use them as a laxative in their green and dried state, eat them in quantities.

Q. 15. Now, if they are laxative, what are the laxative properties due to, according to the best authorities amongst physicians.

(Objected to on the ground that it is not yet proved that they are laxative, that the witness has not so said.)

Mr. MILLER.—I don't think, myself, that they are laxative, nor anybody else.

Q. 16. Just answer the question.

A. Well, so far as that is concerned, I don't think it has ever been determined that there was any specific quality, that is attributable to the fig, that is a laxative more than, perhaps, the mechanical one produced by the seeds and the skin or pulp.

Q. 17. By the mechanical action, do you refer to the mechanical action on the bowels?

A. Certainly, upon the bowels. I know of no other laxative qualities that the fig has.

Q. 18. (By Mr. OLNEY.)—Caused by the seeds and skin, doctor do you say, and the pulp?

A. The seeds and the skin and, possibly, the pulp, but the pulp is largely made up of the seeds, so probably the seeds.

Q. 19. (By Mr. MILLER.)—In your practice, doctor, do you ever come across any patients who have that popular idea, in regard to the laxative qualities of figs?

A. I think I have.

Q. 20. Just state what has been your experience in that regard?

A. Well, I don't think that I could specify any particular case in which I have an instance, but I have had

people frequently say to me that they eat figs as a laxative.

Mr. MILLER.—You can take the witness.

Mr. OLNEY.—No questions.

Examination in Chief of

FREDERICK CHARLES KEIL, witness called on behalf of respondent; sworn.

(By Mr. MILLER.)

Q. 1. What is your full name?

A. Frederick Charles Keil.

Q. 2. What is your age, residence and occupation?

A. I am a pharmacist by occupation. My residence is No. 6 Waller street.

Q. 3. How long have you been engaged in your present business as a pharmacist? A. Since 1885.

Q. 4. Where did you study the business, originally?

A. Practically I studied the business with a druggist in Copenhagen, Denmark.

Q. 5. When did you come to the United States?

A. 1872.

Q. 6. You have made the practice of this profession ever since you came here? A. Yes, sir.

Q. 7. Where have you practiced it?

A. I practiced it in San Francisco and the city of New York.

Q. 8. In what way and to what extent, generally?

A. I was proprietor and manager of a retail drugstore here in 1875 up until 1892; after that I was with Clinton E. Worden & Co., in various capacities.

Q. 9. In what capacity did you work for Clinton E. Worden & Co.?

A. I worked as chemist, as a pharmacist, and doing detail work among physicians.

Q. 10. Do you know anything concerning the popular impression among people, regarding the laxative properties of figs?

A. The popular impression is that figs are laxative.

Q. 11. How long have you known of that popular impression?

A. About since the time that the fig syrup was first placed on the market.

Q. 12. What time was that?

A. That I don't remember exactly, but I think it was about 1880.

Q. 13. You have known of that popular impression among the people ever since 1880, have you?

A. Yes, sir.

Q. 14. If figs are laxative at all, what part of them is it, and in what way are they laxative, according to the best medical authorities?

A. As far as I know, there is no definite laxative property in them, but the laxative property is due to the insoluble mechanical action—the insoluble portions and the mechanical action of the same.

Q. 15. Now, to what part of the fig do you refer, when you speak of a mechanical action?

A. Probably the seed and the insoluble tissue, and the—well, the seed and the insoluble tisue, the seed and skin.

Q. 16. Is that mechanical action on the bowels of a person? A. I presume it is, I don't know.

Q. 17. Do you know anything concerning the laxative properties of senna, and of medicines containing senna, as a principal ingredient? A. Yes, sir.

Q. 18. That is well known in the medical profession, is it, among the druggists?

A. That is well known among the pharmaeutical profession. That is all that I can speak of; and the medical profession as well.

Q 19. Have you any standard preparation containing senna as a laxative, given as a medicine?

A. There is confection of senna and there is compound infusion of senna and various syrups of senna, fluid extract of senna and solid extract of senna.

Q. 20. What is the confection of senna composed of that you refer to?

A. It varies, according to the various pharmacopias, but the United States pharmacopia—according to that it is composed of powdered senna leaves and the pulp of figs and aromatics and purging cassia. In the Universal Pharmacopia of 1832—

Mr. OLNEY (Interrupting).—I object to the witness stating what these pharmacopias state. The publications themselves would be the best evidence.

Q. 21. (By Mr. MILLER.)—Just go on.

A. In the Universal Pharmacopia of 1832, which I have a copy of, they first make a syrup of figs and licorice and sugar. They evaporate them, and add to it powdered senna and tamarind pulp and cassia.

Q. 22. Have you the exact formulas with you?

A. Yes, sir.

Q. 23. Will you please produce them. (The witness produces.)

A. Yes, that I have now, the "National Dispensatory" of 1879, page 447, top of page.

Q. 24. Just read what you find there.

Mr. OLNEY.—I suggest that the reporter take it down from the volume.

A. (Reading.) "Take of senna, in fine powder, 8 troy ounces; coriander, in fine powder, 4 troy ounces; purging cassia, finely bruised, 16 troy ounces; tamarind, 10 troy ounces; prunes, sliced, 7 troy ounces; figs, bruised, 12 troy ounces; sugar in coarse powder, 30 troy ounces; water, a sufficient quantity." Shall I give you the working formula?

Q. 25. (By Mr. MILLER.)—Yes, sir, just go right straight along.

A. "Place the purging cassia, the tamarind, the prunes and the figs in a close vessel with three pints of water, and digest for three hours by means of a water bath; separate the coarser portions with the hand and rub the pulpy mass first through a coarse hair sieve, and then through a fine one or through a muslin cloth; mix the residue with a pint of water, and, having digested the mixture for a short time, treat it as before and add the product of the pulpy liquid thus obtained; then by means of a water bath dissolve the sugar in the pulpy liquid and evaporate the whole until it weighs twenty-four troy ounces; lastly, add the senna and coriander and incorporate them thoroughly with the other ingredients while yet warm. The whole should weigh ninty-six troy ounces.

Mr. OLNEY.—Why not give that page to the reporter and let him copy it from the book?

Q. 26. (By Mr. MILLER.)—What are the medical uses for that confection that you have referred to?

A. It is used as a laxative and as excipient in purgative pills.

Q. 27. Is it used as a laxative, referred to in the pharmacopia? A. Yes, sir.

Q. 28. How long have you known of this confection of senna?

A. Since about 1866 or 1865; since I entered the drug business.

Q. 29. In this formula what is the active or purgative ingredient? A. Principally the senna.

Examination in Chief of

WILLIAM MARTIN SEARBY, witness called on behalf of respondents ; sworn.

(By the EXAMINER.)

Q. 1. What is your full name?

A. William Martin Searsby.

Q. 2. What is your age, residence and occupation?

A. I am sixty-three years of age; my residence is 605 O'Farrell street.

(By Mr. MILLER.)

Q. 3. How long have you practiced your profession as a pharmacist? A. Nearly fifty years.

Q. 4. At what places?

A. First at Guildford, England, next at Norwich, England, then Victoria, British Columbia and, since 1866, San Francisco.

Q. 5. Are you acquainted with any popular impression amongst people at large regarding laxative qualities of figs? If so, state what you have observed in that matter.

A. I have observed that there is a general impression that figs are laxative.

Q. 6. How long have you known of such a popular impression amongst people?

A. Oh, almost from my boyhood; thirty or forty years all together.

Q. 7. Now, if figs have any laxative properties, to what are those laxative properties due, according to the best authorities?

A. The general impression among the best medical authorities is, I believe, that the laxative quality, whenever it is experienced, is due to the irritation produced by the fragments of the seeds, which have been broken in masticating.

Q. 8. You mean irritation upon the bowels?

A. Irritation upon the bowels, yes.

Q. 9. Are you acquainted with the properties of senna?

A. Yes, sir.

Q. 10. For what is senna primarily used in medicine?

A. As a purgative, a laxative.

Q. 11. Do you know of any formula for laxative in which senna is the main ingredient, or principal ingredient?

A. The old fashioned remedy called black draft, which is composed of senna and epsom salts; and the old fashioned Daffy's "Elixir" is a compound tincture of senna. That is the proper name of it. It is still used a good deal in Europe as a laxative; and senna tea has been made for a century, I suppose, by the common people and used both as a purgative and laxative.

Q. 12. Now, I hand you a book that is entitled "Pharmacopia Universalis," and ask you if that is your book and if you are familiar with it, and state what is it?

A. This is mine. I am familiar with this book. I have been using it more or less for twenty-five years or thereabouts. I have had this book in my possession that length of time.

Q. 13. When was the book printed, according to the title page?

A. 1845, the first volume, and 1846, the second. This is the second volume.

Q. 14. Is that a standard pharmacopia, or recognized as an authority amongst druggists and physicians?

A. Well, it is a compilation from a number of works recognized as authority in different countries.

Q. 15. It is compilation of various pharmacopias then, is it?

A. Yes, all the pharmacopias published at the time it was compiled.

Q. 16. That is why it is called the "Universal Pharmacopia," I presume, is it? A. I presume it is, yes.

Q. 17. That is to say, it was a book in which all the other pharmacopias were made use of?

A. Yes, sir.

Q. 18. It is written in Latin, is it?

A. There are some German notes in it. The body of the text is in Latin, the notes in German.

Q. 19. Will you please look on page 691 and state what you find there regarding senna or any laxative of which senna is an ingredient?

A. There is a preparation on that page in which senna, figs, tarmarinds and prunes are used.

Q. 20. Will you read the entire formula?

A. With sugar, coriander seed and licorice as flavoring materials.

Q. 21. Will you please read the entire formula, so that it can be copied into the records?

A. (Reading.) "Take of dried figs, 2 ounces; common water, 1 pound." That means about twelve ounces of our present way of computing the pounds. "Boil to half. Toward the end of the boiling add of sliced licorice root, half an ounce; press out the decoction strain and then expose the clear, decanted portion over a gentle fire until one-fourth part of it is made by evaporation, in which decoction, boiling hot, dissolve of white sugar, 5 ounces; tamarind pulp, 6 drahms; pulp of prunes, 1 ounce and a half; powder of senna leaves, 1 ounce; power of coriander seeds, half an ounce." That is the end.

Q. 22. Now, you say the basic ingredient of that compound is the senna which gives it its laxative properties, I understand?

A. Yes, the principal ingredient that has a medical property is senna.

Q. 23. What are those other things put in there for?

A. Under the impression that they were laxative—tamarinds, prunes and figs.

Q. 24. (By Mr. OLNEY.)—How do you know? You are asked now why they are put in?

A. Well, that is my own inference.

Mr. OLNEY.—You can only testify as to facts, not what you suppose was in the minds of others.

Q. 25. (By Mr. MILLER.)—Does the licorice in there give it any medicinal properties?

A. Not as I know of.

Q. 26. How about coriander seed?

A. That tends to prevent griping.

Q. 27. Senna, I understand, is griping in its effects when used alone, is it?

A. More or less; not always. It depends a good deal upon the condition of the patient, but sometimes it is griping.

Q. 28. And this coriander seed tends to counteract that griping, you say?

A. Yes. Aromatics of some kind are very often added to medicine to prevent griping, but one would never suppose that would be the object for which the coriander was added.

Q. 29. What is the name given in this "Pharmacopia Universalis" to the preparation of senna which you have just read?

A. Confection of senna, or elixir of senna. Some pharmacopias call it one and some call it the other.

Q. 30. What is the general method of preparing a fruit syrup in pharmacy, or a syrup made from fruit?

A. That depends rather upon the nature of the fruit. Ordinarily the juice of the fruit is bruised out, clarified, sometimes by boiling, or other process, and, when a clear juice has been obtained, sugar is then added to it and it is dissolved and the preparation is finished.

Q. 31. What are those syrups generally used for in medicine? A. Well, fruit syrups you mean?

Q. 32. Yes.

A. For flavoring. I don't think just now of any fruit syrup that is used for any other purpose. There might be some, but I don't think of any just now.

Q. 33. What method is generally pursued in labeling those syrups after they are made? That is, what names are given to them?

A. They are ordinarily called syrup; for instance, syrup of raspberry, syrup of strawberry.

Q. 34. That is, the name is given according to the fruit from which the syrup is made? A. Yes.

Q. 35. Now what is a syrup of raspberry?

A. It is a syrup made just as I now explained—by pressing out the juice of the ripe fruit, clarifying it and dissolving in it sugar. That makes a syrup from the fruit of raspberry.

Q. 36. That is called syrup of raspberry?

A. That is called syrup of raspberry.

Q. 37. Now is that same general plan pursued in making syrups of any other fruits?

A. So far as I know, it is. I don't know of any other syrup that is not made by practically that process.

Q. 38. And the name is given according to the fruit from which it is made? A. Yes.

Q. 39. Do you know what are the ingredients of the medicine that is made and sold by the California Fig Syrup Company?

A. I have not any means of knowing. I don't know what it is made of.

Q. 40. You never analyzed it? A. No.

Q. 41. Did you ever hear of the ingredient being made public in any way so that you could know?

A. I have an impression that I saw a statement in public of what it was. I paid no attention to it, because those things are of no value to the average pharmacist.

Q. 42. Then you could not state now what the components of this syrup of figs are, I presume.

A. No, I could not.

Mr. OLNEY.—No questions.

Examination in Chief of

FREDERICK CHARLES KEIL (resumed).

(By Mr. MILLER.)

Q. 30. Mr. Keil, do you know of other formulas in the pharmacopia in which senna is the principal ingredient used as a laxative? A. In the Pharmacopia?

Q. 31. Yes.

A. There is compound infusion of senna, or black draft.

Q. 32. For what purpose is that used?

A. As a purgative and a laxative.

Q. 33. (By Mr. OLNEY.)—Black draft, do you call it?

A. Black draft; yes, sir.

Q. 34. (By Mr. MILLER.)—I now hand you a book entitled "Hager's Manual of Pharmacy," and ask you to turn to page 542, and state what you find there regarding a concoction used for laxative purposes.

A. I find something called "Marienbad Species," or "Marienbad Tea."

Q. 35. What are the ingredients there given?

A. Of senna they use fifty parts; select manna, 100 parts; common mallow flowers, polypodium root and licorice root, of each 12 and one-half parts; figs, 20 parts; white sugar, 25 parts, to make the species or tea. They are made by chopping them up.

Q. 36. What is it that is chopped up?

A. All the ingredients except the sugar. Probably the sugar also, because in those days they didn't have granulated sugar; they had it all in loaves.

Q. 37. For what is that concoction used?

A. It is used, according to some authority, but in another book, for the patients at Marienbad, which is a medical resort where they drink the mineral water and live under strict regime.

Q. 38. What property does the senna impart to the concoction?

A. The senna imparts a mild laxative effect in this proportion.

Q. 39. What is the object of the other ingredients?

A. The object of the other ingredients are, I presume, to prevent griping and improve the taste. Manna is reputed also to have laxative effect.

Q. 40. What is manna?

A. Manna is an exudation from certain ash trees, principally obtained from Calabria, Italy.

Q. 41. What effect does the licorice root and the polypodium root have?

A. The licorice root sweetens it, the polypodium root, I believe, is inert.

Q. 42. You spoke of mallow flowers. What effect does that have?

A. No effect at all, except producing a mucilage.

Q. 43. What effect do the figs have?

A. In this case they may have a slight purgative effect or laxative effect, because as there present they are insoluble ingredients. They are there chopped. That again does not hold good, because they are strained out, presumably afterward when the tea is made. Therefore, the effect of the fig would be nullified.

Q. 44. (By Mr. OLNEY.)—Will you describe the name and date of the book?

A. It is Leipsic, 1875, Pharmaceutical Manual of Dr. H. Hager.

Q. 45. (By Mr. MILLER.)—I now hand you a pharmacopia, entitled "Pharmacopia Universalis," published at Wiemar in 1832, and ask you to turn to page 581, and see what you find there in regard to any preparation of senna when used for laxative purposes.

A. Under the heading of "Electuarion Senna," which is synonymous with confection.

Q. 46. (By Mr. OLNEY.)—Confection of senna, then?

A. It gives reference to all pharmacopias. Without cream of tartar. On page 581, I find a receipt: "Figs, 6 ounces; licorice root, 2 ounces; water, 4 pounds; cook un-

til the remnant is one-half; strain and express and to the strained fluid, add white sugar, 16 ounces; to the diluted syrup add tamarind pulp and prune pulp, 5 ounces of each; powdered senna leaf, 4½ ounces, and powdered anise, ½ ounce. Mix together, mix well." Official at that time in the Prussian, Hanoverian, Oldenburg and Polish pharmacopia.

Q. 47. (By Mr. MILLER.)—Now, for what is that medicine used?

A. Like all other confection of senna, it is used as a purgative and laxative, according to the dose.

Q. 48. What is the basic ingredient of that medicine so far as the laxative property is concerned?

A. Senna.

Q. 49. What are the other ingredients put in there for?

A. They are put in there for what we call corrigens.

Q. 50. Just explain what you mean by that term?

A. A corrigen, that is put in there to counteract any tendency to untoward effects, such as griping, etc., or it is put in merely as a flavoring.

Q. 51. Senna, I understand, then, has a griping effect, has it?

A. As a rule. It depends upon the quality of the senna leaf.

Q. 52. Then I will say sometimes it has a griping effect?

A. Sometimes it has a griping effect.

Q. 53. And these other substances you say are put in there, first for the purpose of correcting that griping effect, and secondly, for giving a flavoring to the medicine?

A. Yes. Since 1876, most senna has a griping effect—1886, I would say.

Q. 54. How do you prepare in pharmacy a medicinal syrup?

A. It is made in two ways. Where the fruit from which the syrup is made is very juicy, they are prepared by expressing the juice, clarifying that by some means and dissolving sugar in it. Where the syrup has to be prepared from a dry fruit such as poppy heads and poppy leaves, or figs or dry prunes, usually an infusion is made which is clarified by different means, and then the sugar is dissolved in it.

Q. 55. Now, taking up the first species of syrup referred to by you, those prepared from the fresh fruits, what syrups of that kind do you know of, and what are they used for?

A. There is pineapple, raspberry, strawberry and blackberry, principally. They are mostly used for flavoring, either medicinal preparations, household preparations or soda water.

Q. 56. Do you know of a syrup of figs made that way, and used for that purpose?

A. I don't think that syrup of figs usually is made from the juice. It may be made from the juice, but the remainder of the fig, after the juice is expressed, is subject to boiling, and the sugar is dissolved in the mixture of the expressed juice, produced by boiling with water.

Q. 57. For what is an article of that kind used?

Q. 58. (By Mr. OLNEY.)—State from your own knowledge. I assume that you have not seen it made, and you don't know how it is used.

A. I have made it.

Q. 59. (Mr. MILLER.)—What is the process of making it, as pursued by you?

A. The process of making it is chopping up the figs or the prunes or the poppy heads, as the case may be, and treating them with boiling water, with or without boiling. Boiling usually is supposed to destroy the flavor. The substance is then strained, and as a matter of economy, expressed. Then it is usually clarified by some means and sugar is added to it. That forms a syrup.

Q. 60. Is that the way in general that you made it?

A. That is the rule laid down for syrups made from dry substances.

Q. 61. How long ago did you make that?

A. I personally made it only once. That was about 1886; but I have no means of telling what it is used for.

Q. 62. 1886? A. 1886; yes, sir.

Q. 63. Did you label it anything, by any name?

A. All of our remedies there were labeled in Latin. It was labeled according to the compounds, syrup of fici indicae.

Q. 64. What does that mean in English?

A. It means syrup of Indian fig, or Oriental fig.

Q. Did you say that it was in 1886 that you made this?

A. It must have been about the year 1886.

Q. 66. Where was it?

A. It was in Copenhagen. The year 1888, I think it was. I can't say positively whether it was 1887 or 1888. I want to change that answer to 1866. I can't say positively whether it was 1867 or 1868.

Q. 67. Was it while you were learning the business of a pharmacist? A. Yes, sir.

Q. 68. When did you commence to learn the business as a pharmacist? A. 1865.

Q. 69. What is your age now?

A. I am very nearly forty-nine.

Q. 70. How long did you remain in Copenhagen, Denmark? A. I remained until 1871.

Q. 71. Where did you go then?

A. I traveled through Europe.

Q. 72. When did you come to the United States?

A. In 1872.

Q. 73. You have been here ever since, have you?

A. Yes, sir.

Q. 74. Have you been back to Europe since then?

A. Not since then.

Q. 75. Now, going back to flavoring extracts made from fruits, I will ask you if you know of a flavoring extract made from the fruit of the fig?

A. I know a flavoring juice made from the fruit of the fig.

Q. 76. How is that made?

A. It is made partly by expression and partly by infusion.

Q. 77. Just give us a little more in detail the process.

A. If I was requested to make it, I would first get the fresh fig and express whatever juice there was in it, then the remainder of the fig, of the crushed fig or bruised fig, I would treat with lukewarm water and express that, and mix the two expressions together and clarify it in some way and bottle it.

Q 78. Is such an article as you have just specified, a commercial article in this market? A. Yes, sir.

Q. 79. For what purpose is it used?

A. Principally for soda water flavoring.

Q. 80. Is it used for flavoring in soda water in the same way that raspberry, strawberry, orange and lemon and those other flavoring matters are used?

A. Yes, sir.

Q. 81. Has it any other effect than a flavoring effect?

A. I hardly think so.

Q. 82. It has no medicinal effect?

A. It has no medicinal effect.

Q. 83. Is that made in the same way that the other flavoring matters are made, such as strawberry and raspberry, orange, and blackberry and so on?

A. Partly in the same way.

Q. 84. What is the distinction?

A. As a commercial saving, it is made by infusion, because it would not yield sufficient juice, the fresh fig would not yield sufficient juice to make it a commercially profitable article. It is, therefore, treated with water. In making that syrup for flavoring, we are only after the flavoring.

Q. 85. Now, what rule is usually pursued in giving a name to a flavoring extract made from fruit, for the purpose of designating it or distinguishing it from others?

A. It takes the name of the fruit.

Q. 86. Just state in general terms how strawberry syrup is made, such as is used in the flavoring extracts in soda water?

A. Flavoring juice and flavoring extract, I beg your pardon, is a different thing. Flavoring juice or fruit juice is made by first garbling the strawberries, taking out all unnecessary ingredients, such as sand and the little bottoms, as they are called, and green leaves; then the remainder is put in a press cloth, and subjected to very strong pressure by which the juice runs out. That juice is then put into bottles and sterilized by heat, and the bottles are corked carefully and sealed sometimes.

Q. 87. Now, is that the raspberry syrup that is used in soda water?

A. That is the strawberry syrup that is used in soda water.

Q. 88. And the same process in general is pursued in making the juice of other fruits that way, is it?

A. Yes, sir.

Q. 89. And then they are labeled as such and such a syrup, according to the fruit from which they are made?

A. From which they are made, yes; such and such a juice.

Q. 90. And you say that the juice is made in substantially the same way and is an article of commerce?

Mr. OLNEY.—He has not said that. I object to words being put into the witness' mouth.

Q. 91. (By Mr. MILLER.)—You may state whether or not a fig juice, made in substantially the same way, is an article of commerce.

A. I hardly think anybody would make a fig juice the same way, because it would not be commercially profitable.

Q. 92. It could be made in the same way?

A. It could be made in the same way; yes, sir.

Q. 93. As I understand it, the only reason they make it in a different way is for economy?

Mr. OLNEY.—We object to that, because there is no statement that it is made in a different way.

Q. 94. (By Mr. MILLER.)—Just go on and answer, Mr. Keil. A. Yes, sir.

Q. 95. Have you already described the way in which it is made? A. In which I suppose it is made.

Cross-Examination.

(By Mr. OLNEY.)

X. Q. 1. Mr. Keil, returning to this article which you made in Copenhagen in 1866, 1867, or 1868, I ask you if that was made under orders from any one?

A. That I don't know. I simply received the order from the head of the department to make it.

X. Q. 2. What were the ingredients of it?

A. Figs, water and sugar.

X. Q. 3. Now, how much of it did you make?

A. I made what would correspond to five pints.

X. Q. 4. What was done with it after it was made?

A. That I don't know.

X. Q. 5. Have you ever made any since that time?

A. No, sir.

X. Q. 6. Have you ever known of any to be made since that time, any similar product?

A. We make, down in the laboratory of Worden & Co., a fig juice for flavoring.

X. Q. 7. When did you commence to make that fig juice for flavoring? A. I never made it personally.

X. Q. 8. You never made it personally?

A No, sir.

X. Q. 9. You know there is such a juice made for flavoring? A. It is in our catalogue.

X. Q. 10. Have you ever seen any of it?

A. I don't think I have.

X. Q. 11. So that you know nothing about it, except from the fact that it is in your catalogue.

A. It is in the catalogue.

X. Q. 12. Then, did you ever make any such flavoring juice in this country? A. No, sir.

X. Q. 13. Did you ever see it made? A. No.

X. Q. 14. You have been a druggist in this city for thirty years, haven't you?

A. Yes, sir; more or less.

X. Q. 15. In drugstores it is a habit to sell soda water, is it not? A. I never kept it.

X. Q. 16. Do you know that other druggists sell these fluid drinks, soda water?

A. There is not very much soda water sold in San Francisco.

X. Q. 17. Did you ever know of any flavoring article made of the juice of figs to be used, of your own knowledge? A. By inference, I do know.

X. Q. 18. But I am only asking what you know. You don't know it?

A. I am not a salesman; I don't know.

X. Q. 19. In your experience as a druggist, have you ever known of an instance of its being used?

A. Except that they must have used it for something —except what I made as apprentice.

X. Q. 20. Except what you made as an apprentice.

A. Yes.

X. Q. 21. I am talking about California, San Francisco. You have been here since 1872?

A. Except the last six years. I came to California in 1874.

X. Q. 22. You said you came to California in 1872, I understood you?

A. I came to the United States in 1872.

X. Q. 23. You had been in the drug business until you entered the employ of Worden & Co.? A. Yes, sir.

X. Q. 24. Continuously, were you not?

A. Yes, sir.

X. Q. 25. Now, during the time that you were in the drug business in this city, do you know of any flavoring extract being used made from figs, or that figs were a part of the ingredients?

A. Personally, I don't know.

X. Q. 26. Now, don't you know as a matter of fact that there is not enough of the quality in figs to make a flavoring extract of any value?

A. I do know. That is the reason that I termed it the process by which it is probably made.

X. Q. 27. You do know that there is not enough—what shall I call it—? There is no flavoring quality, not sufficient of flavoring quality in the figs to make it worth while to make a flavoring extract from it, is there?

A. I don't know that.

X. Q. 28. Don't you know that?

A. I don't know that.

X. Q. 29. Don't you know that there is very little in

the juice of the figs of any quality that would be sufficient to make a flavoring extract for commercial purposes?

A. I know, yes; but outside of pineapple, raspberry, strawberry and blackberry, there is very little flavor in the other juices, but yet they are sold.

X. Q. 30. You have never known of fig juice, however, to be sold?

A. Not personally; no, sir. But pardon me. I can continue on that question. The catalogue has been revised lately—

X. Q. 21. (Interrupting.)—You said you didn't make it yourself, or know anything about it except from the catalogue. I object to your continuing.

Redirect Examination.

(By Mr. MILLER.)

R. Q. 1. You said you only knew by inference, as I understand, that a flavor made from fig juice was used. What did you intend us to understand by that? What was the inference?

Mr. OLNEY.—We object to that as improper, irrelevant and immaterial. Inferences are not testimony.

A. I can make direct testimony. I can make direct testimony that in the revision of the catalogue, which will be published early next year, fig juice was retained among flavoring juices.

R. Q. 2. Did the last issue of the catalogue have fig juice among the flavoring juices?

A. Did the last issue have fig juice as flavoring?

R. Q. 3. Yes. A. Yes, sir.

R. Q. 4. I hand you a book, purporting to be a catalogue of Clinton E. Worden & Co. I show you page 236.

Mr. OLNEY.—What is the date of the book? What is the date of the catalogue?

Mr. MILLER.—There is no date in it. 236.

R. Q. 5. And I also ask you to read into the record the list of flavoring juices printed there.

Mr. OLNEY.—Object to that as being incompetent, immaterial and irrelevant. If you want to put this in evidence, it is another matter.

A. (Reading.)—"Flavoring extracts and soda water requisites."

Mr. OLNEY.—Just hold on. I object on the ground that evidence cannot be made of a witness' reading extracts from a publication or price list.

R. Q. 6. (By Mr. MILLER.)—Proceed.

A. (Reading.)—"Flavoring extracts and soda water requisites. Worden's pure California fruit juices, champagne quarts, assorted as desired: pineapple, orange, blood orange, lemon, prune, crabapple, raspberry, blackberry, currant, apricot, pear, green gage, fig, strawberry, peach, cherry, nectarine, plum, quince, banana."

R. Q. 7. Now, what does that list mean? In other words, what is that list there intended to show?

Mr. OLNEY.—We object to that question on the ground that the list is not in evidence, and, were it in evidence, it would speak for itself what it is intended to show, and the testimony of the witness would not be competent to show what was intended.

R. Q. 8. (By Mr. MILLER.)—I will put the question in

a little different form. What is the object of putting this list which you have just read into that catalogue?

Mr. OLNEY.—We object to that as incompetent, irrelevant, and immaterial. It is not competent to any issue in this case. It makes no difference why or what is the reason anything is put into a catalogue made by the defendant.

R. Q. 9. (By Mr. MILLER.)—Just answer the question now.

A. The object of that list is to give the dealers in soda water a choice of flavors.

R. Q. 10. Are all those different ones there mentioned, manufactured by Clinton E. Worden & Co.?

Mr. OLNEY.—We object to that on the ground that the witness has already said that he did not know that this fig juice was manufactured by Clinton E. Worden & Co. All he knew was that it was in the catalogue.

A. If it was not in stock, it would not appear in a new catalogue.

Mr. OLNEY.—I move to strike that out as not responsive to the question, and as not evidence.

R. Q. 11. (Mr. MILLER.)—Are those things generally kept in stock, or are they made up just as ordered.

A. Yes, they are kept in stock. Champagne quarts, each dozen quarts nailed up in a box.

Recross Examination.

(By Mr. OLNEY.)

X. Q. 1. Have you seen this fig juice yourself in stock in the store? A. No, sir.

X. Q. 2. Then you don't know of your own knowledge that it is kept in stock?

A. I may have seen boxes labeled fig juice.

X. Q. 3. But you have never seen this article in stock in the store?

A. It would not keep if the bottle was opened.

X. Q. 4. Answer my question. You have never seen it in stock in the store?

A. I have never seen it in stock.

(At the hour of 12:30, P. M., a recess was had to 2:30, P. M., at which time proceedings were had as follows:)

Examination in Chief of

MORRIS HERZSTEIN, M. D., a witness called on behalf of respondents; sworn.

(By the EXAMINER.)

Q. 1. What is your name, age, residence and occupation?

A. My name is Morris Harzstein; my occupation is physician; my residence is San Francisco; my age is forty-four.

Q. 2. Mr. MILLER.—How long have you been practicing your profession?

A. Seventeen years or more in San Francisco.

Q. 3. At what place or places?

A. San Francisco.

Q. 4. All the time?

A. Well, I have practiced in Europe.

Q. 5. What did you graduate from?

A. The New York Medical College and the Frederick William University of Berlin, Germany.

Q. 6. What year did you graduate from the College of New York? A. 1881.

Q. 7. Did you go to Europe immediately after that to study? A. No, sir.

Q. 8. How long did you remain there?

A. Well, I remained in Europe about a year or more.

Q. 9. Were you studying medicine in Europe?

A. Afterward; yes, sir.

Q. 10. When was it that you were studying medicine in Europe?

A. In Europe? I finished my education in Europe, graduated from the University of Berlin in 1890, or 1891, I think.

Q. 11. Did you then come to California?

A. I was in California before.

Q. 12. You came to California?

A. I came back to California; yes, sir.

Q. 14. And you have been practicing your profession here ever since, have you? A. Yes, sir.

Q. 14. Doctor, are you aware of the popular impression which exists among people in general, regarding the supposed laxative quality of figs?

A. People generally suppose figs to be laxative, but the laxative quality of figs is due to the irritation of the seeds and the skin produced on the intestinal canal.

Q. 15. How long have you known of such a popular impression among people?

A. Professionally, I have always known that. Prior to that I think mostly everybody has held the impression

that figs are a laxative; that is, the popular impression is such.

Q. 16. Have you ever had occasion to hear anything concerning a laxative medicine on the market, called the California "Syrup of Figs?"

A. Yes, I have heard of it.

Q. 17. Do you prescribe it in your practice for your patients? A. I do not.

Q. 18. What is supposed to be the principal ingredient of that medicine?

A. Well, in a syrup of figs any laxative ingredients can be only from laxative remedies, such as senna.

Q. 19. In manufacturing medicine, if a person were to take figs in a dried state, chop them up fine, and then dissolve them in water and express out the juice, and put that into the medicine, would that fig juice add any to give any laxative property to medicine?

A. I don't think so.

Q. 20. Have you ever heard of any of your patients using this California "Syrup of Figs?"

A. Yes; people use the "Syrup of Figs" quite frequently and they are under the impression that it is a fruit—

Mr. OLNEY (interrupting).—We object to the answer the witness is giving, because it is not an answer to the question.

Q. 21. (By Mr. MILLER.)—Just go on and finish your answer.

Mr. OLNEY.—And we object on the further ground that the witness has no right to state what their impressions are. That they take medicine because they are un-

der such an impression. That he cannot state that of his own knowledge.

Mr. MILLER.—If a doctor don't know that, I don't know who does.

Mr. OLNEY.—I give notice that I shall move to strike all that out.

A. I know people use "Syrup of Figs."

Q. 22. (Mr. MILLER.)—Have you heard of many of you patients using it? A. Yes, sir.

Q. 23. Have they told you why they use it?

(Objected to as incompetent, irrelevant and immaterial.)

Mr. MILLER.—Just answer the question.

A. Yes, they use it because they state it acts as a laxative.

Mr. OLNEY.—That is not in answer to the question.

Mr. MILLER.—I object to your interrupting the witness every time he starts to answer a question. You can object to a question or you can move to strike out.

Mr. OLNEY.—I shall move the Court to strike out that answer.

Q. 24. Mr. MILLER.—What have you done, doctor, in your practice in such cases as that, when your patients made those statements in regard to it?

A. I never allow my patients to use any patent medicines.

Q. 25. Well, why? Why is that?

A. For the very reason that I don't know what they contain.

Q. 26. Have you ever forbid any of them using this "Syrup of Figs?" A. I have.

Mr. OLNEY.—I object to that question as incompetent, irrelevant and immaterial, and shall move the Court at the proper time to strike out the answer.

Q. 27. Mr. MILLER.—What was your ground for doing that?

Mr. OLNEY.—I object to that as incompetent, irrelevant, and immateria..

A. For the reason that it frequently produces griping or tenesmus of the bowels.

Q. 28. Mr. MILLER.—Such griping as that, I presume, would have a bad effect on the patient, would it not?

A. Well, it produces colic, particularly in children.

Q. 29. Now, when you have found any of them using this "Syrup of Figs," how, or in what way, have you induced them to stop using it?

Mr. OLNEY.—I shall make the same motion.

A. For the reason that I do not approve of the administration of any patent remedies, particularly remedies that I am not aware of the ingredients which they contain.

Q. 30. Are the ingredients of this "Syrup of Figs" made public, or are they secret?

A. I don't know.

Q. 31. You have never seen the statement of what the ingredients were, have you? A. I have not.

Q. 32. Has senna a griping effect? A. Yes, sir.

Q. 33. Have you ever been engaged in the matter of manufacturing or have you had any experience in the way of manufacturing medical compounds? A. No, sir.

Q. 34. You are not a pharmacist?

A. I am not a pharmacist.

Q. 35. You are a physician?

A. I am a physician; yes, sir.

Cross-Examination.

(By Mr. OLNEY.)

X. Q. 1. I understand you to say, doctor, that you never have prescribed fig syrup? A. Yes, sir.

X. Q. 2. But you know that some of your patients have taken it? A. I do; yes, sir.

X. Q. 3. I also understand you to say that it frequently produces griping. Can you give any instance where it has that effect?

A. I can recall to my mind a number of times where children have been taking "Syrup of Figs," and it has produced colic or griping.

X. Q. 4. Will you give us the names?

A. I cannot recollect at this moment. I do not recall those to my mind at present; no, sir.

X. Q. 5. Was it in this city? A. Yes, sir.

X. Q. 6. In your practice?

A. In my practice; yes, sir.

X. Q. 7. Where you were the family physician?

A. Yes, sir.

X. Q. 8. Were you the family physician in those cases you speak of? A. Yes, sir.

X. Q. 9. Can you give the name now of a single family where that effect was produced?

A. I cannot; no, sir.

X. Q. 10. How long ago was it?

A. Oh, it has been some three months ago, to my knowledge. And it happened prior to that.

X. Q. 11. When? A. A number of times.

X. Q. 12. When?

A. I can't recollect the dates nor the months.

X. Q. 13. The last time, you think, was about three months ago?

A. The last time, I think, was about three months ago; yes.

X. Q. 14. Now, who was there?

A. I don't remember, because I have a very large family practice, and it is impossible to remember whose child is sick.

X. Q. 15. Now, you say that you had an instance of that before? A. Yes, sir.

X. Q. 16. How long before?

A. I don't remember the time, the exact time.

X. Q. 17. I suppose that any cathartic will produce griping where the bowels or intestinal canal is in a tender condition, will it not?

A. Yes; any cathartic will produce griping where the bowels are in tender condition, but sometimes it will produce griping where the bowels are not in a tender condition.

X. Q. 18. The extent of griping depends very largely upon the condition of one's bowels?

A. Not necessarily.

X. Q. 19. Whether they are sensitive?

A. Not necessarily, because some individuals are very sensitive to the average cathartics, while others are not.

X. Q. 20. Now, there is a good deal of difference be-

tween people in regard to their sensitiveness and the effect of cathartics? A. Certainly.

X. Q. 21. There is a good deal of difference between people in regard to the beneficial effect of a cathartic, is there not? That is, to use the same cathartic will not always act with equal benefit upon all persons?

A. Well, yes, cathartics will not always act alike on the same individual.

X. Q. 22. Isn't there a great variation in the effect of cathartics upon different individuals?

A. Yes, certainly. It depends all upon the amount of cathartics they take.

X. Q. 23. Well, then, it depends upon the amount of cathartic they take, and not upon the individual, does it?

A. Well, it depends upon both.

X. Q. 24. Haven't you found this to be the fact in your practice—that you have to vary your extracts in accordance with what you know of the individual's constitution or the state of his health? A. Certainly.

X. Q. 25. And haven't you found that at one time one cathartic would be good for a certain man, and at another it would not be good for him; that it would depend upon his condition?

A. It depends upon his health, certainly.

X. Q. 26. You have found that variation?

A. Yes, sir.

X. Q. 27. You have found that variation still greater in the case of women, have you not?

A. I can't say that.

X. Q. 28. Now, have you found it still greater in the case of children? A. No, sir.

X. Q. 29. You have not? A. No, sir.

X. Q. 30. But you say that children and men are about the same so far as the variableness of the cathartic is concerned?

A. I think all individuals vary at time.

X. Q. 31. They vary, all individuals vary at times, but you don't see any difference between women, and the men and the children?

A. I don't see any difference as to its variation, only as to the doses.

X. Q. 32. Now, I understand that you don't use any patent medicines at all? A. I do not.

X. Q. 33. Have you ever prescribed anything, any medicine, that you don't know the ingredients of?

A. Not to my knowledge.

X. Q. 34. Have you ever prescribed listerine?

A. Yes, I have prescribed listerine.

X. Q. 35. Have you ever prescribed sulphonal?

A. Yes, I have prescribed sulphonal?

X. Q. 36. Have you ever prescribed bromidia?

A. I have not prescribed bromidia, not to my knowledge.

X. Q. 37. Have you ever taken the trouble to analyze "Fig Syrup?" A. I have not.

X. Q. 38. Do you take the medical journals?

A. I do.

X. Q. 39. Do you ever observe the advertisements in them? A. Sometimes.

X. Q. 40. Have you not noticed in the different medical journals advertisements, showing what the principal ingredients of "Syrup of Figs" are? A. No, sir.

X. Q. 41. You have never seen it?

A. Don't think I have.

X. Q. 42. Has any agent of the California Fig Syrup Company ever called upon you and stated what the principal ingredients were? A. I don't remember.

X. Q. 43. Do you know whether as a matter of fact they have been in the habit of calling on physicians and directing their attention to this medicine?

A. Not that I know of.

X. Q. 44. Where do you say your office is?

A. 801 Sutter street.

X. Q. 45. How long have you been there?

A. I have been at 801 Sutter street, some seven or eight years. I have lived on Sutter street, twelve years—twelve or fourteen years.

X. Q. 46. When the term "Syrup of Figs" is used, you know what it refers to, do you?

A. Well, I do and I do not; not being acquainted with the ingredients, I—

X. Q. 47. (Interrupting.)—Well, you know it refers to this medicine we have been talking about, manufactured by the California Fig Syrup Company?

A. Whenever I have heard of it being used, when patients are using it, I have heard it used in connection with a laxative.

X. Q. 48. But it refers to this particular article, does it not? A. I suppose so.

X. Q. 49. You have no reason to suppose otherwise, have you? A. I don't know.

X. Q. 50. When one of your patients speaks of "Syrup of Figs" or "Figs Syrup," you know what he refers to?

A. Yes, I suppose he means the fig syrup which is on the market.

X. Q. 51. And put up by the California Fig Syrup Company?

A. Well, that I don't know, because I don't—

X. Q. 52. (Interrupting.)—You know it is advertised as medicine?

A. I don't know whether it is the California, or any other fig syrup.

X. Q. 53. You know it is advertised as a laxative medicine, do you?

A. Yes, sir; I know that there is such a remedy advertised.

X. Q. 54. And it is that medicine that you think has produced griping in some cases? A. Yes, sir.

X. Q. 55. Have you found that the general effect was that amongst your patients?

A. It has been the effect in a number of cases, as I have mentioned.

X. Q. 56. Now, if Dr. McNutt and Dr. Winslow, and other leading physicians, and Dr. Anderson and some other leading physicians in this city should say that they had found it an excellent cathartic in their practice, would you not be inclined to hestitate about forming an opinion that it would produce a griping effect.

A. It would not change my opinion at all.

X. Q. 57. It would not? A. No, sir.

Mr. MILLER.—We object to that on the ground that those doctors did not testify to anything of that kind.

X. Q. 58. (Mr. OLNEY.)—That is just what they did testify to.

A. It would not change my opinion at all if Dr. Anderson or Dr. McNutt would state so.

X. Q. 59. You have never taken it yourself?

A. I have not; no, sir.

Redirect Examination.

(By Mr. MILLER.)

Q. 1. Doctor, you have a very large practice, have you not?

Mr. OLNEY.—We object to that as incompetent, irrelevant and immaterial. A. Yes, sir.

R. Q. 2. What are your office hours for patients who come into your office to be treated?

A. From 11 to 1 and from 3 to 5; 3 to 6 usually.

R. Q. 3. Can you give us a general idea about the number of patients that pass through your office per day, during those office hours?

A. During my office hours?

R. Q. 4. Yes, sir.

A. Oh, sometimes thirty or forty, or more.

R. Q. 5. Have you a very large family practice, besides? A. Yes, sir.

R. Q. 6. You are practicing among families during the remainder of the day, are you? A. Yes, sir.

Examination in Chief of

ABRAHAM LEWIS LENGFELD, witness on behalf of respondents; sworn.

(By Mr. MILLER.)

Q. 1. Please state your name, age, residence and occupation?

A. I have given my name, Abraham Lewis Lengfeld. My age is forty-eight; my residence is 1120 Post.

Q. 2. What is your occupation?

A. My occupation is a druggist.

Q. 3. Where is your drugstore?

A. I have two of them, the principal one is at 203 Stockton street, near Geary. The other one is at 803 Sutter street, near Jones.

Q. 4. How long have you carried on the drug business?

A. Since the early part of 1872.

Q. 5. Did you graduate as a physician, also?

A. I am a graduate of medicine.

Q. 6. From what college?

A. The medical department of the University of the Pacific.

Q. 7. Have you practiced any as a physician?

A. Never.

Q. 8. Have you confined yourself to the drug business?

A. I have never practiced as a physician, if I except the time that as a student we were required to attend exercises. My attention has been entirely confined to the drug business.

Q. 9. Are you aware of any popular impression among

people at large regarding the supposed laxative properties of figs?

A. Well, I believe that people at large believe that it is a laxative.

Q. 10. You have heard of that impression among people, have you? A. I have.

Q. 11. Now, if there are many laxative properties in figs, what are those laxative properties due to, according to the best medical authorities?

A. Due to what is generally termed the skin and the seeds.

Q. 12. Is that caused by the irritation or the mechanical action of the skin on the intestinal canal?

A. Dr. Bruton, who is claimed to be the leading English authority on pharmacology and therapeutics, classes figs with bran, oatmeal, and other undesirable substances, claiming that its laxative properties are entirely due to the small seeds, or so-called small seeds—that is not the strict name—present in the fig.

Mr. OLNEY.—I shall move to strike out that answer as not responsive to the question, not evidence.

Q. 13. Mr. MILLER.—Now, if a medicine were prepared, which amongst other things present, figs in a dried state were used, chopped up very fine, and then dissolved or mixed with warm water, and expressed or squeezed so that the juice was taken out of them as much as possible, and that juice put into a medicine, would that fig juice so put into the medicine add any laxative property to the medicine?

A. I think not.

Q. 14. The laxative part of the medicine being the

seed, having been left out of the compound, and only the juice itself having been put in, it would be the same as any other fruit juice, and you think that would not produce any laxative properties in the medicine?

A. I don't think it would act as a laxative if the seeds and the skin were left out.

Q. 15. Did you ever run across this medicine called the "Syrup of Figs" that is prepared and put up by the California Fig Syrup Company?

A. I handle it. Excuse me—I don't handle; I deal in it and have it on hand.

Q. 16. Do you know what the formula is by which it is made?

A. I do not. I have seen published formulas in the various pharmaceutical journals, but have paid no particular attention to them.

Q. 17. You don't know what the constituents are?

A. Not of my own knowledge.

Q. 18. You handle it, I presume, the same as you would any other patent medicine?

A. The same that I would anything else that is called for over the counter.

Q. 19. What is the general method pursued with fruit syrups, such, for instance, those that are used in soda water or for flavoring purposes? How are they usually made?

A. I cannot answer. I have had no personal experience in them. I merely know the theoretical method. If that is satisfactory, I can give that.

Q. 20. What is the theoretical method?

A. We are supposed to crush the fruit, sometimes to allow it to ferment slightly, put it in a press and express the juice, add sufficient sugar to it to make a syrup of it, if necessary, adding some preservative to keep it from fermenting.

Q. 21. What do you do generally in regard to the name of the syrup thus produced? How do you label those syrups?

A. According to the fruit from which it is made, unless it is put up as a proprietary article, of course.

Mr. OLNEY.—No questions.

Examination in Chief of

WINFIELD SCOTT MORRISON, a witness called on behalf of respondents; sworn.

(Mr. MILLER.)

Q. 1. Please state your name, age, residence and occupation.

A. My name is Winifield Scott Morrison. My residence is 659 Castro street. By occupation, I am superintendent of the laboratory of Clinton E. Worden & Co.

Q. 2. How long have you occupied that position?

A. About sixteen years.

Q. 3. In general, what are your duties there?

A. Well, generally, superintendent of the various operations going on in the laboratory.

Q. 4. What experience have you had in the matter of preparing pharmaceutical preparations?

A. Well, I have had a great deal of experience of that myself, as well as superintending others in doing it.

Q. 5. Do they manufacture a great many of those preparations at Clinton E. Worden & Co.'s establishment?

A. Yes, sir.

Q. 6. Have they manufactured there an article called "Fig Juice"? A. Yes, sir.

Q. 7. Just state how that is manufactured?

A. The fresh ripe figs are ground, and then the pulp is put through a press and expressed, the juice is strained, bottled and sterilized.

Q. 8. I presume the seeds and the rind and the skin is all removed? A. Yes, sir.

Q. 9. And only the juice is the result?

A. And only the juice is the result.

Q. 10. Do they put up that juice?

A. They put it up in quart champagne bottles.

Q. 11. Does this small bottle, which I hand you now, labeled "Fig Juice," contain a sample of that article?

A. Yes, sir; I took that from a bottle in stock just before I left the laboratory today.

Q. 12. What is done with it after that?

A. Well, it is sold to the druggist in that shape; to the druggists or candy men or whoever uses it.

Q. 13. What is it used for?

A. It is used for making fig syrup.

Q. 14. What else is it used for?

A. For making any preparation that they may wish to use it in, anything that they may desire.

Q. 15. It is used in soda water, is it?

A. Yes, sir; it is used in soda water chiefly.

Q. 16. Now, what do they do to it to prepare it for use —say, with soda water, for instance?

A. They either mix it with simple syrup or add sugar to it. Then they dilute it with a little water. The usual way is to mix one part of juice with six parts, five parts syrup, five or six.

Q. 17. That makes a fig syrup, then, does it?

A. That makes a fig syrup.

Q. 18. And it is used as a flavoring extract in soda water, just syrup of raspberry is used?

A. Yes, sir.

Q. 19. How long has the firm of Clinton E. Worden & Co. been manufacturing fig juice in this way that you have testified about?

A. Well, at least ten years; exactly, I cannot tell.

Q. 20. Do you keep it in stock? A. Yes, sir.

Q. 21. It is a staple article, is it?

A. It is a staple article. It has been in stock for ten years, to my knowledge.

Q. 22. Now, when you come to use this in the manufacture of the laxative fig syrup, what do you do?

A. Well, we would mix it with the other ingredients of the syrup.

Q. 23. What does this bottle contain that I now hand you, labeled "Fig Syrup," for soda fountain use?

A. It contains one part of fig syrup and five parts of simple syrup mixed together.

Q. 24. In other words, it contains what is found in this first bottle denominated fig juice, plus the simple syrup added to it? A. Yes, sir.

Q. 25. And the proportions used are one to five?

A. The proportions are one to five.

Mr. MILLER.—We offer these two bottles in evidence and ask that the first one be marked "Respondent's Exhibit No. 1," and the fig syrup bottle be marked "Respondent's Exhibit No. 2."

(Marked respectively "Respondent's Exhibit No. 1" and "Respondent's Exhibit No. 2.")

Q. 26. Just explain generally the process of manufacture of simple syrups? A. Simple syrups?

Q. 27. Yes, sir.

A. They are made by adding seven pounds of sugar to four pints of water, and mixed together and dissolved by heat. That makes a simple syrup.

Q. 28. Now, if you desired to make any special kind of flavoring syrup from fruits, what would you do?

A. Mix the juice of that fruit with the simple syrup.

Q. 29. Say you wanted to make strawberry syrup for a soda fountain, what would you do?

A. Take one part of strawberry juice and five or six parts of simple syrup.

Q. 30. How do you get the strawberry juice?

A. By grinding the fruit and expressing it in a press.

Q. 31. Is that the same process that you explained in regard to the fig?

A. Yes, sir; exactly the same, sir.

Q. 32. Then, if you have got that juice, you put it into a simple syrup and you call it strawberry syrup?

A. Yes sir.

Q. 33. Is that same process followed with all other fruits that were used? A. Yes, sir.

Q. 34. What fruit syrups are put up by Clinton E. Worden & Co.?

A. We don't list a line of fruit syrups. We make on orders only.

Q. 35. As I understand, the fruit juices are manufactured to order and carried in stock and, whenever you desire to use them, then you manufacture the syrup from that, do you? A. Yes, sir.

Q. 36. Now, what fruit juices do Clinton E. Worden & Co. manufacture in that way?

A. Raspberry, strawberry, pineapple, banana, orange, lemon—I can't name the whole list.

Q. 37. I now show you Clinton E. Worden's last catalogue, page 236, and ask you if that contains a list of fruit juices manufactured by the house?

A. Yes, sir.

Q. 38. Just read them off, will you?

A. (Reading.) "Pineapple, orange, blood orange, lemon, prune, grape, crabapple, raspberry, blackberry, currant, apricot, pear, green gage, fig, strawberry, peach, cherry, nectarine, plum, quince, banana.

Q. 39. Are all those fruit juices manufactured in the same way in which you have just testified?

A. Well, with very little variation; with one or two exceptions. Banana is made different, from necessity.

Q. 40. What others are made differently, if any?

A. None others. Banana is the exception.

Q. 41. With the exception of banana, then, the others are all manufactured in the same way that you have specified? A. Yes, sir.

Q. 42. Have you had anything to do with the manufacture of this laxative fruit syrup—I mean fig syrup—that is in controversy?

A. That that is manufactured by Clinton E. Worden & Co.? Yes, sir.

Q. 43. What are the general constituents of that, if you remember? A. The laxative part is senna.

Q. 44. And what else do they put in it?

A. Sugar and flavors, essential oils.

Q. 45. With what degree of care was it manufactured?

A. It is always manufactured with great care.

Q. 46. What was the quality of the ingredients that were used in it? A. The best we could buy.

Q. 47. Have you ever had occasion to examine or note the fig syrup that is made by the California Fig Syrup Company? A. I have not examined it.

Q. 48. You have not analyzed it?

A. I have not analyzed it. I have examined it, as to flavor, etc., but I have not analyzed it.

Q. 49. How does it compare with the corresponding article made by Clinton E. Worden & Co.?

A. In some respects, it is somewhat similar to it, but in others it is not. The flavor is not the same.

Q. 50. I show you two small bottles, labeled "A" and "B," and ask you to examine and state what they are, if you know?

A. I made these two samples, but as to which is the one that contains the fig syrup, I cannot state now.

Q. 51. What is the difference between them?

A. One contains ten per cent of fig syrup made from dried figs, and the other is simple syrup in place of the fig syrup.

Q. 52. Both of them are the laxative articles?

A. Yes, both have the same laxative strength, or laxative property of senna.

Q. 53. The only difference between them is that in one of them you leave out the figs? A. Yes, sir.

Q. 54. Now, does that fig juice that is put in there add anything to its laxative property?

A. No, sir; not in my judgment.

Q. 55. What quantity or proportion of figs were used in the manufacture of the laxative, the fig syrup?

A. In this there is ten per cent. As to what we ordinarily use, I can't state off hand.

Mr. MILLER.—We offer these two bottles in evidence and ask that they be numbered Exhibits No. 3 and No. 4.

(The bottle marked "A" is marked "Respondent's Exhibit No. 3" and the bottle marked "B" is marked "Respondent's Exhibit No. 4.")

Q. 56. Are you aware of the popular impression that is among people at large regarding the supposed laxative qualities of figs? A. Yes, sir.

Q. 57. According to the best medical authorities, what is the laxative property of the fig, if it has any laxative property?

A. As far as I know, it has been attributed to the mechanical laxative effect of the seeds and rind.

Q. 58. Then the pure fig juice, itself, would not be laxative, any more than any other syrup, any other fruit juice?

A. I would not be able to state on my own authority as to that. I am not a physician.

Q. 59. When did you commence to study pharmacy?

A. About fifteen years ago.

Q. 60. Had you ever heard of this laxative preparation, called California Fig Syrup, before that time?

A. No, sir.

Q. 61. It is only since you have been in business since you have heard of it? A. Yes, sir.

Cross-Examination.

(By Mr. OLNEY.)

X. Q. 1. I understand you that this is an article that you say you have manufactured and had in stock for ten years? A. No, sir; two.

X. Q. 2. How long have you been working for Clinton E. Worden & Co.?

A. I can't state exactly; something over twelve years.

X. Q. 3. Do you know how long they have been in business in this city—that concern? A. No, sir.

X. Q. 4. During the time, or during the twelve years or more that you have been with them, have you been working here for them in the city all the time?

A. Yes, sir.

X. Q. 5. I suppose you kept account of all articles manufactured, did you not? A. Yes.

X. Q. 6. Have you ever manufactured any syrup of strawberry? If you have, you kept an account of it, I suppose?

A. Well, yes; but I can't say that we kept an account of everything of that description.

X. Q. 7. But did you manufacture any large quantity of these fruit syrups? A. Not, syrup; no, sir.

X. Q. 8. You did not? A. Juices.

X. Q. 9. Juices. Did you manufacture them in large quantities?

A. Yes, sir; we manufacture them in large quantities.

X. Q. 10. Did you keep count of what you manufactured? A. Yes, sir.

X. Q. 11. Did you keep an account of what you manufactured of this fig juice?

A. I can't say that it is all down; no, sir.

X. Q. 12. Well, that is the regular course of business, to keep an account, is it not? A. Yes, sir.

X. Q. 13. And, so far as you know, a record was kept of all that was done? A. Yes, sir.

X. Q. 14. Who keeps that record? A. I do.

X. Q. 15. Do you keep it personally, or is it kept under your supervision? A. I keep it personally.

X. Q. 16. That is, you make entries in a book, yourself, do you? A. Yes.

X. Q. 17. Now, have you the book in which you made these entries, showing the amount of fig juice that you manufacture?

A. I can't say that I have it from the beginning.

X. Q. 18. What is that?

A. I can't say that I have back to the beginning of all that is manufactured?

X. Q. 19. How far back have you got them?

A. I can't say without looking it up.

X. Q. 20. Will you produce to-morrow the books that you have? A. I could; yes, sir.

X. Q. 21. How many have you got?

A. I can't state.

X. Q. 22. Well, what have you done with them? What do you do with them? Do you keep them under your own supervision, your own personal supervision?

A. Yes, sir.

X. Q. 23. Will you produce all that you have got?

A. I can; yes, sir.

X. Q. 24. I give you notice now that I shall want to examine you on those books to-morrow morning. Now, you have manufactured this fig juice, you say, and kept it in stock. Have you sold any of it? A. Yes, sir.

X. Q. 25. Now, when you make a sale of fig juice, you keep a record of it, do you?

A. I don't know. I do not; no, sir.

X. Q. 26. You do not?

A. Well, the books of the concern might show it. I don't know.

X. Q. 27. That you don't know? A. No, sir.

X. Q. 28. Now, do you keep an account of the materials that you use in the manufacture of an article like fig juice? A. Not beyond a certain time; no, sir.

X. Q. 29. Not beyond a certain time? What time is that? A. Probably a year.

X. Q. 30. Probably a year back?

A. Yes, sir. After they become too old, they are discarded.

X. Q. 31. What is the quantity of this fig juice that you have manufactured and kept in stock?

A. I can't state as to that.

X. Q. 32. You can state in round numbers, can't you? One gallon, two gallons?

A. Well, it is more than that; somewhere in the

neighborhood of twenty gallons, or twenty-five gallons. I could not say positively.

X. Q. 33. Is that the total amount that the concern has manufactured? A. No; I could not state.

X. Q. 34. You could not state? A. No, sir.

X. Q. 35. Have they manufactured it more than once?

A. Yes.

X. Q. 36. Every year?

A. I can't say that they manufacture it every year.

X. Q. 37. How much do they manufacture in one year, according to your recollection, in any one year.

A. I can't state; it was so long ago that we started to manufacture.

X. Q. 38. You can't remember, then, how much was manufactured? A. No, sir.

X. Q. 39. Because it was so long ago?

A. Well, they have manufactured it for a long time.

X. Q. 40. They have manufactured about the same amount every year? A. No, sir.

X. Q. 41. What has been the variation?

A. Well, fruit juices don't sell so much now as they used to.

X. Q. 42. Well, when they were selling well, what was the variation?

A. Well, I can't state that. There are a great many of these juices, that we manufacture and ship East to various firms.

X. Q. 43. Do you remember any sale of juices having been made of this fig juice?

A. Not of my own personal knowledge; no, sir.

X. Q. 44. You stated what this fig juice was used for. Did you ever see it used?

A. I have never seen it used for those purposes; no, sir.

X. Q. 45. Then you don't know, of your own knowledge, what was done with it?

A. No, sir; I know it is sold; that is all I know; and it was taken out of stock.

X. Q. 46. Did you, in answer to a question asked you by Mr. Miller, state that it was used for certain purposes, but you didn't see it used?

A. Yes. It was sold with the other fruit juices. I can't say with regard to all the others.

X. Q. 47. We only want to have your own knowledge, not what you suppose.

A. It was sold as fruit juice.

X. Q. 48. But what the purchaser did with it, you don't know? A. No, sir.

X. Q. 49. You say it was put up in quart champagne bottles? A. Yes, sir.

X. Q. 50. You didn't follow it any further?

A. No, sir.

X. Q. 51. You say it was put up in quart champagne bottles? A. Yes, sir.

X. Q. 52. Now, your record must show how many bottles were manufactured? A. Not necessarily so.

X. Q. 53. What is your habit in regard to that?

A. Each year, and at the end of the year, the records are destroyed, as they are not permanent records. They were simply as a guide from one season to another.

X. Q. 54. But did you manufacture this fig juice and put it into these quart bottles? A. Yes, sir.

X. Q. 55. And there was a record made of the amount that was manufactured?

A. I think there was; I am not positive.

X. Q. 56. And you think there was a record made of the sale, or, rather, of the amount sold?

A. A record of the number, but not of all.

X. Q. 57. Where was this fig juice sold?

A. I can't state.

X. Q. 58. All over the United States?

A. I suppose so.

X. Q. 59. You suppose so?

A. In the general course of business.

X. Q. 60. You don't know? A. No, sir.

X. Q. 61. Have you anything to do with the selling, at all? A. No.

X. Q. 62. Then how do you know about this?

A. I know the orders come into the laboratory and the goods go out.

X. Q. 63. They are put up and sent downstairs?

A. Yes.

X. Q. 64. That is all that you know about it?

A. That is all that I know about it.

X. Q. 65. You don't see the buyers? A. No, sir.

X. Q. 66. You don't see the goods shipped?

A. Sometimes.

X. Q. 67. You do see the goods shipped?

A. Yes.

X. Q. 68. You don't see the buyer, and you don't have anything further to do with it?

A. I know that the goods are shipped.

X. Q. 69. In some instances, you have seen them shipped? A. Yes, sir.

X. Q. 70. You stated that this was used in making fig syrup and soda water. Did you ever see it used for that purpose? A. No, sir.

X. Q. 71. Then, that is simply your understanding of the way to which it is put? A. Yes, sir.

X. Q. 72. You also made a statement that this was used in the manufacture of a laxative medicine known as "Fig Syrup," did you not? A. Yes, sir.

X. Q. 73. This juice? How long have you been doing that?

A. Well, I didn't state that we used this fig syrup in the manufacture of fruit juice.

X. Q. 74. I misunderstood you, then. You didn't say that you used this in the manufacture of the laxative medicine which you call fig syrup? A. No, sir.

X. Q. 75. Put up by Clinton E. Worden & Co.?

A. No, sir; I did not.

X. Q. 76. You did state, though, that you had fig juice in that medicine, didn't you? A. Yes, sir.

X. Q. 77. Will you state again the quantities of fig juice that you used?

A. I use it in the form of figs chopped up.

X. Q. 78. You use it in the form of figs chopped up?

A. Yes, sir.

X. Q. 79. What is the proportion that you use?

A. I can't say. I can't state without my record.

X. Q. 80. You say that it does not add to the laxative quality of the medicine?

A. I state that I don't know of my own knowledge whether it does or not.

X. Q. 81. You did not say that it did not?

A. No, sir; I did not.

X. Q. 82. You don't know, of your own knowledge?

A. No, sir.

X. Q. 83. If it does not add to the laxative quality of the medicine, what do you put it in there for?

A. I don't know whether it does or not.

X. Q. 84. But you answer my question. Assuming that it does not add to the laxative quality of the medicine, what do you put it in the medicine for?

A. As I said, I don't know whether it does or not.

X. Q. 85. That is not the question. (Cross Question 84 read.)

A. Because I was told to.

X. Q. 86. Who told you? A. My employer.

X. Q. 87. Which one of your employers?

A. Mr. Clinton E. Worden.

X. Q. 88. Personally? A. Yes, sir.

X. Q. 89. Did he give you a formula for making it?

A. No, sir.

X. Q. 90. Did you manufacture the medicine yourself?

A. Yes, sir.

X. Q. 91. This laxative medicine? A. Yes, sir.

X. Q. 92. He didn't give you a formula for making it?

A. No, sir.

X. Q. 93. Did he tell you how to make it?

A. He mentioned in a general way; yes, sir.

X. Q. 94. And did you get any further instructions as to how to make it? A. I consulted with him; yes.

X. Q. 95. You consulted with him as to how to make it? Did you have any instructions as to what color to make it? A. No, sir; not particularly.

X. Q. 96. Not particularly. Did you have any instructions?

A. We were not particular about that. It was not colored at all.

X. Q. 98. It was not colored at all? A. No, sir.

X. Q. 99. Do you mean to say that the medicine put up by you is colorless? A. No, sir.

X. Q. 100. Well, what is the color of it?

A. The color is owing to the ingredients used.

X. Q. 101. The color is owing to the ingredients used? What is that color? A. It is brownish.

X. Q. 102. Now, what ingredients do you use in the preparation that gives it its color? [*No answer.*]

X. Q. 103. Is there no other ingredient that gives it a color? A. No, sir.

X. Q. 104. That is the only ingredient in your composition that gives it this brown color?

A. With the sole effect that figs may have on it.

X. Q. 105. Do you use any other ingredient except senna and figs? A. Yes, sir.

X. Q. 106. What other ingredients do you use?

A. Essential oils.

X. Q. 107. More than one kind? A. Yes, sir.

X. Q. 108. How many kinds?

A. I think there are four.

X. Q. 109. Four kinds of essential oils? What is the purpose of those essential oils? A. For flavoring.

X. Q. 110. To give it a flavor? A. Yes, sir.

X. Q. 111. What other purposes?

A. To counteract any griping.

X. Q. 112. Will you state what those essential oils are?

A. Peppermint and—well, I would rather have time to look it up—not to state positively, because I might make a mistake. Peppermint is one.

X. Q. 113. Was all this medicine that was manufactured by Clinton E. Worden & Co. manufactured under your superintendence? A. Yes, sir.

X. Q. 114. Was there anybody besides yourself and Clinton E. Worden that knew the ingredients or knew the contents of the medicine? A. Yes, sir.

X. Q. 115. Who was it?

A. The man who did the work.

X. Q. 116. The man who did the work? Who gave him instructions, as to the way that it should be prepared? A. I did.

X. Q. 117. Then you told him how much to put in of each kind? A. Yes, sir.

X. Q. 118. You put in senna and this fig juice and four essential oils? A. Chopped figs.

X. Q. 119. You didn't put in the fig juice? I beg your pardon again. You put in chopped figs and four essential oils? A. I think it is four essential oils.

X. Q. 120. You don't remember the proportions?

A. No, sir.

X. Q. 121. They were never written out for you?

A. Yes, sir.

X. Q. 122. Eh?

A. Yes, sir; they were written out.

X. Q. 123. Do you have them in the factory?

A. Yes, sir.

X. Q. 124. You have seen the medicine put up by the California Fig Syrup Company, called "Fig Syrup," haven't you? A. Yes, sir.

X. Q. 125. Where did you see it?

A. In the laboratory.

X. Q. 126. In your laboratory? A. Yes.

X. Q. 127. How much did you have there?

A. I could not state as to that.

X. Q. 128. When was it that you had it in your laboratory?

A. Well, I think here has been a bottle there for two or three years.

X. Q. 129. Well, has there not been more than one bottle? A. Yes, sir.

X. Q. 130. How many bottles?

A. I could not state.

X. Q. 131. Now, do you remember how much was brought here originally? A. No, sir.

X. Q. 132. Was it a dozen bottles?

A. No, it was less.

X. Q. 133. Half a dozen bottles?

A. I think, I could not state; it was less than a dozen, I know that.

X. Q. 134. Now what did you do with that medicine?

A. That was brought to the laboratory.

X. Q. 135. You examined it? A. Yes, sir.

X. Q. 136. What else did you do with?

A. I could not state exactly what was done with it.

X. Q. 137. You could not state? What is the reason you can't?

A. Well, I gave it to a gentleman to examine it.

X. Q. 138. What?

A. I gave it to a chemist to examine.

X. Q. 139. How much did you give him to examine?

A. I gave him the original package.

X. Q. 140. You gave him all the original packages?

A. Well, at different times. I can't remember back. It extends over a good many years.

X. Q. 141. You gave him the original packages to examine?

A. I have given him an original package, but how many or at what times I can't state.

X. Q. 142. Did he analyze it?

A. I believe he did.

X. Q. 143. And he reported to you, did he not?

A. Yes, sir.

X. Q. 144. Do you remember what he reported to have found as the ingredients of the composition?

A. Well, he stated that the basis, I believe, of the laxative part was senna.

X. Q. 145. Anything else?

A. He gave the density of the syrup and the amount of alcohol it contained.

X. Q. 146. Now do you use any alcohol in yours?

A. Yes, sir.

X. Q. 147. Did he state that there was any peppermint in it? A. Yes, sir.

X. Q. 148. Did he state that there were any essential oils? A. Yes, sir.

X. Q. 149. Were they the same that you put in your medicine? A. I don't know.

X. Q. 150. You don't know?

A. I don't remember.

X. Q. 151. You have given that statement somewhere, haven't you? A. I don't know.

X. Q. 152. You don't know. Did you ever have more than one examination made by that chemist, or one analysis? A. Yes, sir; I think we did.

X. Q. 153. How long apart?

A. I could not state as to that.

X. Q. 154. Six months?

A. Possibly more. I don't know. I could not state.

X. Q. 155. Was the first analysis that he made before you commenced to manufacture the medicine?

A. I could not state as to that. I don't know.

X. Q. 156. You don't remember? Well, now, is there any way in which you can fix the time that you gave him this bottle to analyze? A. No, sir.

X. Q. 157. Now, how long did you say it was that you gave it to him again for analysis?

A. I didn't state any time. I don't know how long ago.

X. Q. 158. How is that?

A. I don't know how long ago it was.

X. Q. 159. Now, have you ever given him a bottle since then to analyze?

A. Well, I know he has had several, but I don't know how many.

X. Q. 160. You know he has had several from time to time? A. Yes, sir.

X. Q. 161. Now, what did you want him to analyze those bottles for?

A. Well, because we were requested to discover, if we could, what it was made of.

X. Q. 162. Did you do that in order to manufacture a medicine as nearly like it as you could?

A. Well, the reason it was done was because there was a query as to what the principle was.

X. Q. 163. That is not answering my question. Was not the purpose with which you gave this to him to analyze, to enable you to manufacture a medicine like it?

A. Originally? No, sir.

X. Q. 164. Was it at any time?

A. I can't state as to that, as I don't remember.

X. Q. 165. What was the original purpose then that you gave it to him for analysis?

A. Curiosity, to find what was in it.

X. Q. 166. Curiosity? That was all, was it? Just simply curiosity?

A. That is the reason I gave him the sample to analyze.

X. Q. 167. Now, when you gave him again for analysis, what was your object?

A. I think one of our travelers brought it in and asked to know what was in it.

X. Q. 168. Was that the only reason?

A. That was the only reason that I had; yes, sir.

X. Q. 169. That was the only reason you had when you gave it to him again? What was that reason?

A. I don't remember of giving him but two samples.

X. Q. 170. You don't remember of giving him but two samples? A. Yes, sir.

X. Q. 171. You said a little while ago that you have done it several times.

A. I remember those two now.

X. Q. 172. Did your chemist write out what the ingredients were? A. Not to my knowledge, no, sir.

X. Q. 171. But he did tell you what those ingredients were? A. Yes, sir.

X. Q. 174. And the medicine that you afterward manufactured and called the "Syrup of Figs" was substantially the same ingredients, was it not?

A. Yes, sir. I had been manufacturing it previous to that.

X. Q. 175. You had been manufacturing it previous to that? A. Yes, this laxative.

X. Q. 176. Do you always use the same ingredients in the manufacture of fig syrup? A. Yes, sir.

X. Q. 177. You always had?

A. Yes, always; approximately the same.

X. Q. 178. Now, you state that you have got the formula for this medicine? A. Yes, sir.

X. Q. 179. You state that you cannot remember all the four essential oils? A. No, sir.

X. Q. 180. Is there any other ingredient besides senna, fig juice or chopped figs and these four essential oils?

A. And alcohol.

X. Q. 181. Anything else?

A. That is all I can remember at this time.

X. Q. 182. Did you put in any henbane in it?

A. Yes, I had forgotten that; a small amount; a very small amount.

X. Q. 183. Now, there is something else that you have remembered. Is henbane an essential oil?

A. No, sir.

X. Q. 184. What is the reason you didn't tell me when I asked you before, that you had henbane in it?

A. I didn't think of it.

X. Q. 185. Don't you know that henbane is a poison?

A. Yes, sir.

X. Q. 186. Isn't that the reason that you didn't tell me in answer to my question, that you put henbane in it?

A. No, sir.

X. Q. 187. Can you remember, now, these four essential oils?

A. No, sir.

X. Q. 188. Can you remember any other ingredients that you put in it? A. No, sir.

X. Q. 189. Do you put any sugar in it?

A. Yes, sir.

X. Q. 190. Then there is something else?

A. I don't remember whether that was mentioned or not.

X. Q. 191. No, it was not. You put in sugar. Now, was that all you put in? You put in senna and chopped figs and sugar and henbane and peppermint. Now, is there any thing else?

A. Well, there are two or three oils that I don't wish to mention until I am more sure about them.

X. Q. 192. Will you post yourself in regard to that so as to answer my question tomorrow? A. Yes, sir.

Mr. MILLER.—We will give you the formula. We are not ashamed of ours as you are of yours. We are perfectly willing to make ours public. We have our chemist right here to give you the formula, everything that is in it. There is nothing secret about it at all and never has been.

(By Mr. OLNEY.)

X. Q. 193. Now, I understand you to say that all this medicine has been manufactured under your superintendency? A. Yes, sir.

X. Q. 194. Have you always used fig juice in the manufacture of that medicine, or chopped figs?

A. No, sir.

X. Q. 195. When did you use this chopped figs first?

A. I can't state.

X. Q. 196. For how long did you use it?

A. Well, it is a good many years ago.

X. Q. 197. Were chopped figs used in your medicine at the time this injunction was served?

A. I can't state as to that. I think we were using it previously, but I can't state as I have no records of the dates.

X. Q. 198. Who is the man who does the actual work or manual labor of mixing this medicine?

A. Well, the man who used to do it in years gone by was Mr. Ryan—P. A. Ryan.

X. Q. 199. As I understand you, you bought a package of the medicine put up by the California Fig Syrup Co.? A. I can't say as to that. I didn't buy it.

X. Q. 200. You didn't buy it? A. No, sir.

X. Q. 201. You don't know whether the purchase was made by the concern for which you worked or not?

A. No, sir.

X. Q. 202. It was brought into the laboratory?

A. It was brought into the laboratory.

X. Q. 203. And you think it was something less than a dozen bottles? A. Yes, sir.

X. Q. 204. Now, have you any record there to fix the time when that was done? A. No, sir.

X. Q. 205. Do you know how long ago it was?

A. No, sir.

X. Q. 206. Two years ago?

A. I think it was longer.

X. Q. 207. Do you think it was longer than three years ago? A. I could not state.

X. Q. 208. How soon after you got this package was it that you had this analysis made by your chemist?

A. I think it was made at once.

X. Q. 209. Made at once? But the time you can't fix?

A. No, sir.

X. Q. 210. Now, that is all, Mr. Morrison, until you produce those records.

Redirect Examination.

(By Mr. MILLER.)

R. Q. 1. Mr. Morrison, state about how many different medicines or preparations the firm of Clinton E. Worden & Co. manufacture, if you can?

A. I can't state positively; there are so many.

R. Q. 2. Are there a great many?

A. There are a great many.

R. Q. 3. Do they run up into the thousands?

A. Well, I think, taking everything, they do; extracts and tablets and everything, I think they do; yes, sir; I know they do run up over a thousand.

Recross Examination.

(By Mr. OLNEY.)

X. Q. 1. Do you manufacture any medicines except this laxative fig syrup that you have been talking about?

A. Yes, sir.

X. Q. 2. How many different kinds of medicine do they manufacture?

A. Well, I can't state. You will have to modify that question a little to enable me to answer it.

X. Q. 3. Well, now, perhaps you can suggest to me a way in which I can modify that question so that you can answer it.

(X. Q. 2 read.)

A. First, I would like to know what you class as these medicines—whether you mean preparations used for medicinal purposes strictly, or—

X. Q. 4. (Interrupting.) Yes, sir; certainly.

A. Well, a great many of them?

X. Q. 5. A great many of them? How many?

A. I could not state.

X. Q. 6. A thousand?

A. I think there are more than a thousand.

X. Q. 7. That you manufacture? A. Yes, sir.

X. Q. 8. Do you manufacture any proprietary medicine except laxative, this fig syrup?

A. Yes, sir; I don't know whether you would call it proprietary or not.

X. Q. 9. Do you manufacture any medicines besides this that is upon the market, and commonly known as proprietary medicines?

A. Well, they are termed nonsecret medicines.

X. Q. 10. They are termed nonsecret medicines? What names do you give to those medicines that you manufacture?

A. The names usually apply to the ingredients.

X. Q. 11. To the ingredients. But you take the name of some medicine that is well known on the market, do you not, and use that name, and then on the bottle you give the ingredients? Is that the custom?

A. No, sir; not to the best of my belief; that is not the custom.

X. Q. 12. Don't you know? A. No, sir.

X. Q. 13. That is not a question of belief. Don't you know? A. I can't say that I do know.

X. Q. 14. What medicines do you manufacture?

A. Well, syrup of tar and wild cherry.

X. Q. 15. Some other names?

A. Compound syrup of sarsaparilla.

X. Q. 16. Some other names.

A. White pine balsam.

X. Q. 17. Now, do you manufacture any medicine that is known on the market as a proprietary medicine?

A. I am not positive as to that, as I don't know. I think some of our medicines have copyrighted names.

X. Q. 18. Are they copyrighted for the benefit of your concern? A. I suppose so, sir.

X. Q. 19. You don't know whether they are imitations or not?

A. To the best of my belief they are not.

X. Q. 20. Does your concern manufacture any medicines that are imitations of medicines manufactured by other people? A. Not that I know of.

X. Q. 21. Does your concern not manufacture medicines and give them the same name that other medicines are given or that other parties apply to medicines of their manufacture? A. Not that I know of.

X. Q. 22. Not that you know of? A. No, sir.

X. Q. 23. Well, you know all in this case, don't you?

A. Well, I can't say that I do. I had nothing to do with the naming of it.

X. Q. 24. I am not talking about that. Your concern manufactures a medicine called syrup fig, and the California Fig Syrup manufacture the medicine which it calls "Fig Syrup." A. Yes, sir.

X. Q. 25. Now, is there an instance in the business of your house where you have manufactured a medicine and put it on the market when at the same time some other firm or other concern was putting a medicine of the same name on the market?

Mr. MILLER.—Will you please tell me, Mr. Olney, what that has to do with this case as a material question?

Mr. OLNEY.—I don't know that I am under any obligation to explain to you.

Mr. MILLER.—You certainly, as a lawyer, know that that is an improper question to ask. I have not objected

to any of these questions because I don't like to make objections to questions. But you certainly must know that it is improper question to put to the witness.

Mr. OLNEY.—I know that it is a perfectly proper question, Mr. Miller.

(X. Q. 25 read.)

Mr. MILLER.—The question is objected to as incompetent, irrelevant and immaterial, because this suit is based on the alleged sales of a medicine called "Syrup of Figs," and not of some other medicine that is not involved in this case at all, and, therefore, if they were manufacturing a thousand other medicines under the circumstances detailed in the question, it would be immaterial to this case; because no suit has been brought on them, and the complainant does not claim all the medicines in the world.

(By Mr. OLNEY.)

X. Q. 26. Will you answer the question?

A. I don't know of my own knowledge; no, sir.

X. Q. 27. Now, will you let me see your catalogue?

(The witnesses produces.)

Mr. OLNEY.—This cross-examination is continued until the record is produced by the witness.

Examination in chief of

AUGUST CHAS. ZEIG, a witness called on behalf of respondents; sworn.

(By the EXAMINER.)

Q. 1. What is your full name?

A. August Charles Zeig.

Q. 2. What is your age, residence and occupation?

A. I am thirty years of age; by occupation I am a chemist.

Q. 3. Where do you reside? A. San Francisco.

(By Mr. MILLER.)

Q. 4. Where did you study chemistry?

A. At the University of Michigan, Ann Arbor.

Q. 5. How much experience have you had since leaving college in the matter of chemistry?

A. About nine years.

Q. 6. At what place? A. With Worden & Co.

Q. 7. You are now employed by Clinton E. Worden & Co., are you? A. Yes, sir.

Q. 8. How long have you been employed by them?

A. I think eight or nine years.

Q. 9. What is the general nature of your duties there?

A. As chemist, analytical chemist, making analysis.

Q. 10. An analytical chemist, eh? A. Yes, sir.

Q. 11. They have manufactured a medicine there in the past known as "Syrup of Figs," I believe. Will you please state what are the constitutents of that medicine as manufactured by Clinton E. Worden & Co.?

A. The constituents of the preparation known as "Syrup of Figs" are figs and senna, with aromatic oils.

Q. 12. What proportion of figs do they put in it?

A. I don't remember the proportion.

Q. 13. But you know figs enter into it?

A. Yes, sir.

Q. 14. In what shape are they put into it?

A. They are put in as chopped figs.

Q. 15. Dried figs chopped up, are they?

A. Yes, commercial dried figs, chopped up.

Q. 16. Then, what did you do with them?

A. They were treated with water and extracted.

Q. 17. That is, the figs are chopped up, put in water, and then expressed or extracted?

A. Yes, sir; and the extract put into the syrup.

Q. 18. Now, what is the main ingredient of the medicine, the laxative ingredient? A. I think senna.

Q. 19. Now, what other substances were put into the medicine besides the senna and the figs?

A. Some aromatic oils.

Q. 20. Please name the oils that were put in.

A. As close as I remember, it is oil of peppermint and oil of cloves, and perhaps some oil of cassia.

Q. 21. Then you have senna, fig juice and oil of peppermint and oil of cloves and cassia?

A. Yes, I think those are the ingredients. I am not positive.

Q. 22. You add water to it, I presume, or simple syrup, I presume?

A. Yes, sir; there is some water added to it.

Q. 23. With sugar? A. Sugar.

Q. 24. You have not with you the data to show exactly what the constituents were, have you? A. No, sir.

Q. 25. Have you that data at home or at the factory?

A. At the factory.

Mr. MILLER.—Then we will continue the examination of this witness until he can produce it to-morrow. I will ask you to produce it tomorrow.

Further hearing adjourned to Tuesday, December 20, 1898, at 10 A. M.

Tuesday, December 20, 1898, 10 a. m.

Counsel appearing:

For complainant, Warren Olney, Esq.

For respondents, John H. Miller, Esq., and Purcell Rowe, Esq.

Examination in chief of

AUGUST CHARLES ZEIG (resumed).

(By Mr. MILLER.)

Q. 26. Mr. Zeig, have you made any analysis of the "Syrup of Figs" put up by the California Fig Syrup Co., and which is the subject matter of this suit?

A. Yes, sir.

Q. 27. Did you detect any figs in it or any trace of figs?

A. No, sir.

Q. 28. When did you make the analysis?

A. About a year ago, as near as I can remember.

Q. 29. Was it before or after this suit was commenced? A. I don't remember, I think it was after.

Q. 30. About that time you think, was it?

A. Yes, sir; I think it was a year ago last July.

Q. 31. You found other substances there did you?

A. Yes, sir.

Q. 32. What did you find?

A. I found extract of senna and sugar and alcohol and flavoring oils.

Q. 33. What flavoring oils did you find?

A. Oil of peppermint, oil of cloves and I think oil of coriander.

Q. 34. Could you detect any ginger? A. No, sir.

Mr. MILLER.—I will state in regard to our own formulas, that I expected to prove it by this witness. I will prove it by another witness who will immediately follow, under whose charge the formula has been.

Cross-Examination.

(By Mr. OLNEY.)

X. Q. 1. When did you first make an analysis of this alleged "Syrup of Figs" put up by the complainants?

A. About a year ago.

X. Q. 2. Is that the first time?

A. The first time I made an analysis.

X. Q. 3. How long have been in the employ of Worden & Co.? A. Between eight and nine years.

X. Q. 4. Do you know of an analysis having been made by Worden & Co. before that time? A. No, sir.

X. Q. 5. This is the first time that you have made any?

A. The first time.

X. Q. 6. Did you ever make an analysis more than once? A. Of this same preparation?

X. Q. 7. Yes, sir. A. No, sir.

X. Q. 8. That is, only one time?

A. The only time.

X. Q. 9. You found sugar in the preparation, did you?

A. Yes, sir.

X. Q. 10. In your opinion as a chemist, would it be possible for you to detect by analysis the presence of figs in the preparation if the figs were only in small quantities, or if it was not in large quantity?

A. If it was in any perceptible quantities, yes, I think I could detect them.

X. Q. 11. What would be the characteristics that you would expect to find if there were figs in the preparation?

A. Well, I would expect to find an extract having the odor and all the flavor and characteristic of the fig, if properly extracted.

X. Q. 12. When the skins and seeds are eliminated and there is nothing left but the mucilaginous substance, what is its taste?

A. It has got the characteristic taste of the fig.

X. Q. 13. It is sweet, isn't it?

A. Yes, sir; it is sweet; but it has got the same flavor.

X. Q. 14. It has got the same flavor? Now, in the analysis, if there had been a small quantity of fig juice, is it not possible that it would have escaped your attention?

A. I don't think so.

X. Q. 15. You think not? A. No, sir.

X. Q. 16. Now, how much fig juice would be required in a production of this kind to attract your attention so that you would discover it?

A. Ten or twenty per cent.

X. Q. 17. From ten to twenty per cent?

A. Yes, sir.

X. Q. 18. If it was less than ten per cent you think you could not?

A. I guess less; perhaps even five per cent.

X. Q. 19. You think perhaps even five per cent?

A. Yes.

X. Q. 20. Now, what do you mean by the percentage? Do you mean percentage of bulk or of weight?

A. I mean bulk; by measure.

X. Q. 21. In making an analysis of this kind, of such a production as fig syrup, can you tell what kind of sugar is used in its manufacture?

A. Yes, you can. You can tell whether it is cane sugar, or whether it is glucose.

X. Q. 22. What did you find here?

A. I found cane sugar.

X. Q. 23. Did you find any other sugar?

A. No, sir.

X. Q. 24. Did you look for grape sugar?

A. Yes, sir.

X. Q. 25. You looked for it? A. Yes.

X. Q. 26. You didn't find any?

A. I didn't find any.

Examination in chief of

GEORGE ALT, a witness called on behalf of respondents; sworn.

(By the EXAMINER.)

Q. 1. What is your full name? A. George Alt.

Q. 2. What is your age, residence and occupation?

A. My age is sixty-seven years; my occupation is farming.

Q. 3. Where? A. Nevada, Washoe county.

(By Mr. MILLER.)

Q. 4. How far from Reno do you live?

A. A little over four miles.

Q. 5. At what place? A. Glendale.

Q. 6. How long have you lived there?

A. Since 1863.

Q. 7. I notice in these articles of incorporation of the California Fig Syrup Company the following names of incorporators given: Richard E. Queen, James H. Kinkaid, George Alt, Simeon Bishop and Thomas E. Haydon. Are you the George Alt mentioned in that?

A. Yes, sir.

Q. 8. You are acquainted, then, with the gentlemen whose names have been given there?

A. Yes, sir; they are old acquaintances of mine.

Q. 9. How long have you known Mr. Queen?

A. About twenty-two or twenty-three years; something like that.

Q. 10. Did you know him up in Reno, Nevada, when you started to sell this preparation? A. Yes, sir.

Q. 11. Did you know him before the incorporation?

A. Yes, sir.

Q. 12. Who is this gentleman who is named here as James Kinkaid?

A. He is mining superintendent at the present time in Virginia at the Occidental Mining Works.

Q. 13. Do you know whether he had any connection with the California Fig Syrup Company now?

A. I think not.

Q. 14. Who is Simeon Bishop?

A. He is a doctor, living in San Francisco at the present time.

Q. 16. And he was connected with this institution at this time? A. Yes, sir.

Q. 16½. And who is Thomas E. Haydon?

A. Thomas E. Haydon is an attorney at law living in Reno.

Q. 17. Just state what was your connection with this California Fig Syrup Company a little more in detail regarding the manufacture of the medicine.

A. Well, I will have to commence from the start, I think. I put up money in regard to paying expenses from the first start of the concern. Afterward, I think in the latter part of 1881—the first part of 1882—1881 and '2—the winter of 1881 and '2—I went to manufacture it out at my place.

Q. 18. For whom were you manufacturing it?

A. For the Fig Syrup Company.

Q. 19. At what place? A. Glendale.

Q. 20. Was that manufacture there done in pursuance of an understanding between you and Mr. Queen and the other members of the company? A. Yes, sir.

Q. 21. Was all the fig syrup that was manufactured by the California Fig Syrup Company during those years manufactured by you at that place? A. Yes, sir.

Q. 22. In other words, that was the place of manufacture of the stuff? A. Yes.

Q. 23. Was that stuff that was then made sold by the California Fig Syrup Company? A. Yes, sir.

Q. 24. Now, will you please give the formula under which that fig syrup was then made. If you have any data in your possession, just produce it, and state how you came by it and what it is.

A. (Producing.) I came by this when I went to manufacture it. Mr. Queen turned it over to me. The company insisted upon him giving us the formula, so that it

would not be kept secret from them when I went to manufacture it.

Mr. OLNEY.—We have a right to see it before it is testified to.

Mr. MILLER.—Just show it to Mr. Olney. I guess Mr. Queen will be familiar with it.

Mr. OLNEY.—I want to ask the witness about the paper.

Mr. MILLER.—I objected to your interrupting the examination. I have not offered it in evidence yet.

Mr. OLNEY.—Very well, then, the witness can't testify in regard to it.

(Mr. MILLER.)

Q. 25. Mr. Alt, when you started in to manufacture this stuff up there for the California Fig Syrup Company, how did you get the formula by which to manufacture it?

A. Mr. Queen gave it to me.

Q. 26. Was it written out on a paper?

A. Yes, sir.

Q. 27. Where was it put?

A. The formula that he gave me first was given to me, and afterward the company insisted that they—

Mr. OLNEY (Interrupting).—I move to strike that out, that the company insisted.

Mr. MILLER.—He has not given it yet. I don't think it is fair to interrupt a witness in the midst of giving his testimony. You have a perfect right to object to a question and you have a right to move to strike it out.

A. The first formula was given to me to manufacture it by, and afterward the company objected upon making a record in our minute books of the formula. Mr. Queen

would not agree to that, but he said he would give us the formula and he would lock it up.

Q. 27. Was it written out on paper?

A. Yes, sir.

Q. 28. Was it locked up? A. Yes, sir.

Q. 29. Where?

A. In a tin box, left with the secretary. The secretary turned it over, I presume. I don't know anything about that.

Q. 30. Who was the secretary? A. Sol Levi.

Q. 31. Where does Sol Levi live? A. Reno.

Q. 32. Does he live there now? A. Yes, sir.

Q. 33. If I understand, this paper which you have produced, is not the original but it is a copy?

A. No, it was copied from it.

Q. 34. When and where was this copy made?

A. Made in Reno.

Q. 35. By whom? A. By Sol Levi.

Q. 36. When? A. In the spring of 1882.

Q. 37. Is it in his handwriting? A. Yes, sir.

Q. 38. Were you present there?

A. Yes, sir; I read it off to him to copy.

Q. 39. You read off the original to him?

A. Yes, sir.

Q. 40. And he made a copy? A. Yes, sir.

Q. 41. Then what was done with this copy?

A. He put it in his safe. It has been there ever since.

Q. 42. When did you get this copy from him?

A. About a week ago.

Q. 43. Is this a true copy of the original formula?

A. All except the ginger below there. That was added after I went to manufacturing.

Q. 44. I mean is this a correct copy of the formula as you manufactured the medicine?

A. That is the correct formula as I manufactured it.

Mr. MILLER.—Now I offer this in evidence and ask that it be marked.

Mr. OLNEY.—We object to its being received in evidence on the ground that it only purports to be a copy and does not come from the complainant and the original from which it is copied is not accounted for.

(Marked "Respondent's Exhibit No. 5.")

(By Mr. MILLER.)

Q. 45. Mr. Alt, I don't observe in this formula any figs. Were there not any figs in the medicine.

A. No, sir.

Q. 46. Do you mean to say there were no figs at all or anything in the shape of figs?

A. No, sir; none whatever.

Q. 47. Did you have any figs around the establishment?

A. I believe there was a sack bought and set in the wrapping house.

Q. 48. What was that done for?

Mr. OLNEY.—Wait a moment.

Q. 49. Figs? Where?

A. In the house where we wrap.

Q. 50. (By Mr. MILLER.—Who had that done?

A. Mr. Queen.

Q. 51. Did he give any reason for it?

A. Well, he wanted to keep up an appearance that we was using figs, he said.

Q. 52. But as a matter of fact there were no figs used at all? A. None whatever; no, sir.

Q. 53. During the whole time you were manufacturing it? A. Not any.

Q. 54. I noticed down at the bottom of this formula also some mention is made of ginger as follows: "Ground ginger is thrown between the layers of senna and pressed with the leaves together. It prevents griping." Now, had the medicine been made without the ginger at any time? A. Prior to that.

Q. 55. What had been the result?

A. There was considerable complaint about griping.

Q. 56. Where did the complaints come from?

A. From the parties who used the medicine.

Q. 57. Around Reno? A. Yes, sir.

Q. 58. What was this ground ginger put in there for?

A. It was presumed to stop the griping.

Q. 59. That is what it was put in there for, was it?

A. Yes, sir.

Q. 60. Did you have any complaints of griping after the ginger was put in?

A. No; not to any extent, I think.

Q. 61. Not to any extent? A. No.

Q. 62. Now, did you have any conversation with Mr. Queen wherein you stated the reason for having adopted this name, "Syrup of Figs," or anything in that connection?

A. Well, he thought it was a good name to sell it by;

that a great many people thought that figs was a laxative and he adopted the name for that purpose.

Mr. OLNEY.—I give notice that I shall move to strike out that answer on the ground that it is not responsive to the question and is not evidence.

Q. 63. Mr. MILLER.—Did Mr. Queen make any statement to you substantially of that kind? A. Yes, sir.

Mr. OLNEY.—I give notice that I make the same objection. I object to that question and also to the answer.

Q. 64. Mr. MILLER.—Had the name been adopted at the time that you became connected with the concern?

A. I think I was connected with it as soon as there was anything done in regard to the matter.

Q. 65. Did you have anything to do with the selecting of the name? A. I think not; no, sir.

Q. 66. Who had that?

A. Mr. Queen suggested that. Mr. Queen and Mr. Bishop talked to me about the name as soon as I came into it I put up some money right at the start; at least, I understood that it was right at the start. I never heard it mentioned before that.

Q. 67. They got the thing up and then you put up some money? A. Yes, sir; I put up some money.

Q. 68. I understand you to say that the name was selected by Mr. Queen, or by Mr. Queen and by Dr. Bishop?

A. Yes, sir. Mr. Queen—and Dr. Bishop. Dr. Bishop talked to me some time about it. Mr. Queen was the man that was handling the concern.

Q. 69. You have no connection with the corporation now, have you? A. None whatever.

Cross-Examination.

(By Mr. OLNEY.)

X. Q. 1. How long since you have been connected with the corporation?

A. It was the fall of 1883 that I became disconnected with it.

X. Q. 2. You had some trouble with Mr. Queen, did you not, at that time?

A. Not particularly with Mr. Queen, no.

X. Q. 3. You were a director of the corporation for a while, were you not? A. I was.

X. Q. 4. Up to what time?

A. The fall of 1883.

X. Q. 5. And didn't you have some trouble with Mr. Queen and the other stockholders, or some of the other stockholders about your connection with the company?

A. Well, I don't know as I had.

X. Q. 6. Didn't you have some law suits over the matter? A. Yes, sir.

X. Q. 7. You were removed as a director by order of the court, were you not?

A. Yes, sir; that is correct.

X. Q. 8. Did you have any personal dispute with Mr. Queen?

A. Well, I don't know whether I really had any words with him.

X. Q. 9. You looked upon him, however, as the man who was responsible for having you removed from the corporation, did you not?

A. Well, I don't know but what I thought it the majority of the stock. I presume they all petitioned. I considered that the company had me removed.

X. Q. 10. Well, Mr. Queen was responsible for it, wasn't he? A. Well, yes; perhaps he was.

X. Q. 11. You so regard him, as responsible for it?

A. Well, I regarded the "Syrup of Figs" company as responsible for it. They were the party that sued to have the old board removed.

X. Q. 12. Who was the largest stockholder in the company at that time?

A. Well, Mr. Queen was the largest. Mr. Queen and Mr. Haydon.

X. Q. 13. Don't you know that he was the man who caused these proceedings to be instituted?

A. Perhaps he was. I always presumed it was the petition from the majority of the stock.

X. Q. 14. Then you won't remember any personal quarrel with him about the affairs of the company?

A. No, I don't know as I do.

X. Q. 15. You and he have not been on friendly terms since, have you? A. Well, no; not at all, no.

X. Q. 16. Where is Glendale in Nevada?

A. It is in Washoe county, east from Reno four miles.

X. Q. 17. Is it a town?

A. Well, it is not a town at the present time; what you might call a town. It was a town once.

X. Q. 18. Was it a town in 1881? A. No, sir.

X. Q. 19. You have a farm there? A. Yes, sir.

X. Q. 20. It is simply the name of a place, isn't it, Glendale?

A. Well, before the railroad was completed Glendale was quite a town, and it always carries the name.

X. Q. 21. But since that time and in 1881 there was no town there, was there? A. No, sir.

X. Q. 22. Was there anybody living there when you were there at that time, near you? A. Oh, yes.

X. Q. 23. How far away?

A. Six hundred yards.

X. Q. 24. Now, you manufactured this medicine for how long a period at that place?

A. Well, I don't know as I could really tell. It is something less than two years.

X. Q. 25. Can you fix the time?

A. No, I could not fix it any nearer than that.

X. Q. 26. Now, are you satisfied that you manufactured that medicine for as long a period as one year.

A. Oh, yes; pretty near two years.

X. Q. 27. But you can't fix the time? A. No.

X. Q. 28. You are certain about that, that you can't fix the time? A. No, I can't fix the time.

X. Q. 29. Do you remember making an affidavit in the case of the California Fig Syrup Company against the improved Fig Syrup Company in this court?

A. No, sir.

X. Q. 30. Did you ever make an affidavit?

A. Not that I remember of.

X. Q. 31. Do you know Mr. Boone, the attorney?

A. No, sir.

X. Q. 32. Have you ever made an affidavit in any of the cases where the California Fig Syrup Company have

brought suit against the infringers before you came here?

A. No, sir.

X. Q. 33. Do you know where the medicine was manufactured before you commenced it? A. In Reno.

X. Q. 34. Who manufactures it? A. Mr. Queen.

X. Q. 35. Did you have anything to do with the manufacture there?

A. No. I would help them once in a while when I was in town.

X. Q. 36. What was the reason for moving the factory from there down to your farm?

A. Well, there was no conveniences where Mr. Queen had it.

X. Q. 37. Do you remember any discussion being had in regard to the fact that by going to your farm it would be more retired, so that people would not see how much medicine was manufactured?

A. That was one of the reasons, I guess.

X. Q. 38. That was one of the reasons?

A. Yes, sir.

X. Q. 39. That was one reason, wasn't it, that it was talked about? A. Yes, sir; one reason.

X. Q. 40. That your farm was a retired place?

A. Yes, sir.

X. Q. 41. And that if it was manufactured there, there was no likelihood of any body seeing what materials were used? Isn't that the fact?

A. Yes, sir; that was some of the talk.

X. Q. 41. That was some of the talk?

A. Yes, sir.

X. Q. 42. Don't you know that that was the reason that that factory was removed to your place?

A. Yes.

X. Q. 43. Did you at any time at that place, at Glendale, keep figs in sight, so that if anybody came there—

A. (Interrupting.)—Yes, sir.

X. Q. 44. You did that? A. Yes, sir.

X. Q. 45. You did that by direction of Mr. Queen.

A. Yes, sir; he ordered the figs.

X. Q. 46. That was at Glendale? A. Yes, sir.

X. Q. 47. Then you did have the figs at Glendale?

A. Yes, sir.

X. Q. 48. How many did you have there?

A. He got a sackful of them.

X. Q. 49. Where were they?

A. They were left in the wrapping house.

X. Q. 50. Left in the wrapping house.

A. Yes, sir.

X. Q. 51. Now, how many rooms were occupied in the manufacture and general preparations of this medicine?

A. One.

X. Q. 52. Just one room? A. Yes, sir.

X. Q. 53. Now, where was the wrapping house?

A. The wrapping-house was about a quarter of a mile away.

X. Q. 54. About a quarter of a mile away?

A. Yes, sir.

X. Q. 55. It was still on your farm, was it?

A. No, sir; it was a house we rented.

X. Q. 56. The house that you rented?

A. From a neighbor; yes, sir.

X. Q. 57. Now, what was there in what you call the wrapping-room?

A. That is where the medicine was taken and bottled and wrapped.

X. Q. 58. That was after it was manufactured at your place, it was taken there? A. Yes, sir.

X. Q. 59. And wrapped there? A. Yes.

X. Q. 60. And packed?

A. Yes, and packed there and shipped.

X. Q. 61. There is where you say this sack of figs was?

A. Yes, sir.

X. Q. 62. Now, don't you know that Mr. Queen instructed you always in the manufacture of this medicine to use figs? A. No, sir; never.

X. Q. 63. He did not? A. He never did.

X. Q. 64. You are positive about that? A. I am.

X. Q. 65. Your idea was that that sack of figs was there simply for the purpose of deception?

A. That is what he said himself; to keep it there and people would think we were using it.

X. Q. 66. You were interested in the company at that time? A. Yes, sir.

X. Q. 67. You were a party to that deception?

A. Yes, sir.

X. Q. 68. Did you manufacture any large quantity of medicine during that time?

A. Yes, sir; quite considerable.

X. Q. 69. You say that you were connected with the manufacture of this medicine from the start?

A. Yes, sir.

X. Q. 70. Do you know when the manufacture was commenced? A. Not exactly.

X. Q. 71. Now, as a matter of fact, Mr. Queen came to some people there in Reno and told them that he had a good preparation and talked about organizing a company, did he not, and you amongst the number?

A. Yes, sir; something to that effect; that he could get up something, that he was about to get up something.

X. Q. 72. About to get up a company?

A. Yes, sir.

X. Q. 73. That was the first that you knew about it?

A. Yes, sir.

X. Q. 74. He had been making and selling it for sometime, hadn't he?

A. I think not; no, I never saw any sold until after.

X. Q. 75. You never saw any sold until after the company was formed? A. No, sir.

X. Q. 76. What made you think it was a valuable production if it never had been sold to your knowledge?

A. Well, he was telling what could be done with it.

X. Q. 77. Are you in the habit of making investments in a concern without knowing whether or not it will be a money-making concern in your opinion?

A. He asked me to put up some money—a hundred dollars—to make a test.

X. Q. 78. What test?

A. To make a test of the medicine, to see if it would go before the people.

X. Q. 79. He asked you to put up one hundred dollars?

A. Yes, sir.

X. Q. 80. Did you put it up? A. Yes, sir.

X. Q. 81. Was that all you put up?

A. No; I put up money afterward.

X. Q. 82. You put up money afterward? [*No answer.*]

X. Q. 83. Now, how long before this, before you put up any larger amount, was it that you put up this one hundred dollars to make the test?

A. Well, I could not tell that. It was some time, long afterward.

X. Q. 84. How much did you put up afterward?

A. I think in all about four hundred dollars.

X. Q. 85. Now don't you know that at the time that Mr. Queen did this that the medicine had been sold already very largely? A. I do not.

X. Q. 86. You don't know that? A. No, sir.

X. Q. 87. That might be the fact without your being able to remember it at this time, might it not?

A. Well, it might have been sold without my knowledge.

X. Q. 87. What?

A. It might have been sold some and I not know anything about it. But my putting up the one hundred dollars—it was to get it before the public to ascertain if it would sell. I was willing to risk one hundred dollars in it.

X. Q. 88. You can't fix that time?

A. No, I can't fix that time. Perhaps 1879; not far from that; 1878 or 1879.

X. Q. 89. Do you remember at any time when the sales commenced to be quite large?

A. About 1881 or 1882.

X. Q. 90. About 1881 or 1882?

A. About 1881.

X. Q. 91. Now, when was it that you put up the one-hundred dollars?

A. Well, I could not tell you exactly; along between the time that the first was put up and the time that I went out of the concern.

X. Q. 92. You say you are a farmer, Mr. Alt?

A. Yes, sir.

X. Q. 93. How long have you been a farmer?

A. I have been a farmer where I live since 1863.

X. Q. 94. You have been living at that same place all the time? A. Yes.

X. Q. 95. That is about four miles, you say, from Reno? A. Yes, sir.

X. Q. 96. Now, sir are you still of the belief that you never made affidavit in the case of the California Fig Syrup Company against the Improved Fig Syrup Company?

A. I am not positive. I can't remember anything about it.

X. Q. 97. You don't remember having made any such affidavit?

A. I may have made one but I don't remember anything about it.

X. Q. 98. Now, I show you a printed copy of your affidavit.

Mr. MILLER.—I object to that unless he shows him the original.

A. I may have made the affidavit but I forget now.

X. Q. 99. (Mr. OLNEY.)—Look at that printed copy now, and I will ask you if that does not refresh your memory?

A. Well, I suppose I did make that, too. I forgot all about it.

X. Q. 100. Do you remember now of having made such an affidavit?

A. I do not remember now, but that certainly is the affidavit.

X. Q. 101. Do you remember any one coming to you and asking you to make an affidavit in the case?

A. Well, that is something that had entirely slipped my memory.

X. Q. 102. You don't remember that, then?

A. No, I do not.

X. Q. 103. You don't remember going before the clerk of the District Court of Washoe county and swearing to the affidavit.

A. Well, it is something that had entirely slipped my memory.

X. Q. 104. Well, it is a fact, then, that you don't remember? A. I don't remember.

X. Q. 105. You don't remember who came to you about it?

A. No, no, I don't remember anything about it. Undoubtedly, I made that affidavit; no question about it.

X. Q. 106. I will ask you, Mr. Alt, not to go away until I can get the original affidavit to show you. The cross-examination is suspended. The witness is now shown a paper entitled the "California Fig Syrup Company (a corporation), vs. the Improved Fig Company (a corpo-

ration) et al—an affidavit of George Alt, and filed with the Clerk of this Court on the second day of May, 1892. Is that your signature, Mr. Alt?

A. Yes, sir. I undoubtedly made that, but I don't remember anything about it now.

X. Q. 108. You don't remember any correspondence with anyone here in San Francisco in regard to it?

A. No sir; I don't.

X. Q. 109. I see that in this affidavit you state that you acted as president of this corporation from 1882 until October 30, 1883? A. Yes, sir.

X. Q. 110. And, further than that, that during that time you manufactured the article?

A. I manufactured it the year previous to that.

X. Q. 111. The year previous to that?

X. Q. 112. The statement is contained in this affidavit as follows: "Affiant avers that he was engaged in the manufacture of complainant's laxative compound, commonly known as 'Syrup of Figs' or 'Fig Syrup,' under the direction of R. E. Queen, one of the officers of said company, and now the president and general manager thereof, from January 1, 1882, until October 30, 1883."

A. I was president.

X. Q. 113. Now you say that you were manufacturing it during that time? A. Well, so I was.

X. Q. 114. Is that a fact?

A. Yes, sir; and I manufactured it previous to that year.

X. Q. 115. You manufactured it before that time?

A. At Glendale.

X. Q. 116. At the same place? A. Yes, sir.

X. Q. 117. Now, previous to what time was it that you were manufacturing it at Glendale? Previous to Jan. 1, 1882? A. Yes.

X. Q. 118. You say in your affidavit that you manufactured it from the first of January, 1882, to the thirtieth day of October, 1883? A. Yes, sir.

X. Q. 119. Now, did you make it previous to that time?

A. I did.

X. Q. 120. How long previous?

A. I could not say. Sometime previous.

X. Q. 121. But you don't remember when you commenced?

A. No, I could not say when I commenced.

X. Q. 122. Did you commence manufacturing it before you became president?

A. Yes, sir—oh, yes.

X. Q. 123. Do you know where you got these dates when you swore to this affidavit?

A. No, I could not tell you that.

X. Q. 124. Because you don't remember anything about the affidavit, I suppose? A. No, sir.

(By Mr. MILLER.)—Will you put that affidavit in evidence? You have examined him in regard to it and it will be unintelligible to the Court without the affidavit being in. Will you offer the affidavit in evidence?

Mr. OLNEY.—I will not.

Mr. MILLER.—I offer the affidavit, then, in evidence, inasmuch as the counsel who has produced it declines to do so, and I ask that it be copied in the record.

(Note by stenographer.—Following is a copy of the affidavit last above referred to:)

In the Circuit Court of the United States, in and for the Northern District of California, Ninth Circuit.

CALIFORNIA FIG SYRUP CO. (a Corporation),
Complainant,
vs.
IMPROVED FIG SYRUP CO. (a Corporation),
Respondent.

Affidavit of George Alt.

United States of America,
Northern District of California,
City and County of San Francisco. } ss.

George Alt, being first duly sworn, deposes and says: "That he was one of the original incorporators of the complainant corporation, and acted as president of said corporation from June, 1882, until October 30, 1883.

Affiant avers that he was engaged in the manufacture of complainant's laxative compound, commonly known as 'Syrup of Figs,' or 'Fig Syrup,' under the direction of R. E. Queen, one of the officers of said company, and now the president and general manager thereof, from January 1, 1882, until October 30, 1883; and that he, said affiant, thereby became acquainted with the ingredients which constitute complainant's said compound. Affiant further

avers that said compound, during the said time, and while said affiant was so engaged in its manufacture, contained no fig extract or syrup of figs, and that no figs whatsoever were used in manufacturing said compound.

That the factory of the complainant corporation, during the time hereinbefore mentioned, was situated in Glendale, State of Nevada.

Affiant further avers that said R. E. Queen, president and general manager of said complainant corporation, said to this affiant that it would be well to keep figs in sight, in order that people coming into the factory would think that figs were used in the manufacture of the compound. Affiant further avers that said figs were placed on exhibition solely for deception, and were never used in the manufacture of said 'Syrup of Figs,' during the time that said affiant was engaged in the manufacture thereof.

Affiant further states that he has no knowledge of any change having been made in the formula used while he was manufacturing the fig syrup; and avers that said R. E. Queen wrote to this affiant and asked him for the formula of 'Syrup of Figs' used by affiant while he was so as aforesaid manufacturing said compound, and after this affiant had ceased to have any interest in the said corporation.

GEORGE ALT.

Subscribed and sworn to before me this twenty-ninth day of April, 1892.

[Seal] O. H. PERRY,

Clerk of the District Court, Washoe County, Nevada."

Redirect Examination.

(By Mr. MILLER.)

R. Q. 1. Now, Mr. Alt, you were asked something about a lawsuit that was between you and Mr. Queen and the company, or some of those people connected with the California Fig Syrup Company. Will you just state how it arose and what it was about?

A. Well, it was talked quite a while—

Mr. OLNEY (interrupting).—I object to that as irrelevant and immaterial and incumbering the record uselessly.

Mr. MILLER.—I fully agree with you that it was irrelevant. I objected to it. You brought it out and I shall therefore have to explain the whole matter. I entered the further objection that it is immaterial what the law-suit was about and any facts in regard to it, except the fact that there was a law-suit between the parties and that Mr. Alt was removed from the company.

R. Q. 2. (By Mr. MILLER.)—Now, just go on and explain the matter, Mr. Alt.

A. Well, Mr. Queen got control of the stock in some way or other, he and his friends did. They went into Court and brought an action and had the old board ousted and elected a new board of their own.

R. Q. 3. Who was in the old board?

A. Well, I don't believe my memory would be good enough to tell.

R. Q. 4. Were you in the old board?

A. Yes, sir.

R. Q. 5. You were one of the old board?

A. I was one of the old board. I was president of the company at the time.

R. Q. 6. And you were president of the company at the time? A. Yes, sir.

R. Q. 7. And you say Mr. Queen got hold of a majority of the stock in some way and brought a suit to oust the old board and have a new one appointed?

A. Yes, sir.

R. Q. 8. Did he have a new one appointed?

A. Yes, sir.

R. Q. 9. Did you have a new one appointed?

A. Yes, sir.

R. Q. 10. Do you know who they were?

A. Well, I presume I could tell. Himself, a man by the name of Quinn, Mr. Haydon, Mr. Congdon. The other I can't remember.

R. Q. 11. Who was this Mr. Quinn that you refer to?

A. He is a hardware man in Reno. He is a merchant.

R. Q. 12. Who is this Mr. Haydon?

A. Mr. Haydon is an attorney at law in Reno.

R. Q. 13. What connection did he have with Mr. Queen?

A. There was some connection, I believe.

R. Q. 14. What became of your stock in the company?

A. It was sold for assessments.

R. Q. 15. What board was it that levied the assessments on it?

A. The new board, the board that ousted us. After we were ousted that board levied an assessment to absorb the stock.

R. Q. 16. In other words, then, the whole transaction

was about this; that Mr. Queen got a majority of this stock in some way or other, got up this suit and ousted the old board and then levied an assessment upon the stock, or had the new board levy an assessment on the stock, and your stock was sold out for that assessment?

A. Yes, sir; that is correct.

R. Q. 17. Was anybody else's stock treated in that way? A. Yes, sir.

R. Q. 18. Whose stock?

A. I think Levi Bros.' stock was treated in that way, Mr. Thyes'—a man by the name of Mr. Thyes—

R. Q. 19. (Mr. OLNEY.)—How is the name spelled?

A. T-h-y-e-s, I think.

R. Q. 20. (By Mr. MILLER.)—What became of Dr. Bishop's stock, do you know?

A. I forget what action was taken with his. I don't know what became of his. I can't remember. I think he sold his before, prior to this; I think he sold his.

R. Q. 21. Do you remember how much of an assessment they levied on the stock? A. I do not.

R. Q. 22. How many shares did you have?

A. I was in control of twenty thousand.

R. Q. 23. And there was one hundred thousand in the whole company, I believe? A. Yes, sir.

Examination of

W. S. MORRISON (recalled).

(By Mr. MILLER.)

Q. 1. Mr. Morrison, will you please produce the formula that was used by Clinton E. Worden & Co. in

the manufacture of this "Fig Syrup" or this laxative "Fig Syrup" before the injunction was served on you?

A. Yes, sir; that is the formula. (Producing.)

Q. 2. Is that the formula which you now produce?

A. Yes, sir.

Q. 3. And was the stuff manufactured according to that formula? A. Yes, sir.

Mr. MILLER.—We offer that formula in evidence and ask that it be marked Respondent's Exhibit No. 6.

Mr. OLNEY.—We object to that as incompetent, irrelevant, and immaterial.

(Marked "Respondents' Exhibit No. 6.")

Q. 4. (By Mr. MILLER.)—You were asked something about the henbane that was put into this medicine. Under what name is it specified there?

A. Hyoscyamus.

Q. 5. For what purpose do you understand that was put into the medicine?

A. As a sedative, to prevent griping.

Q. 6. You were asked also about henbane being a poison. It is a poison, I believe, is it?

A. Yes, sir; in overdoses.

Q. 7. In overdoses? A. Yes, sir.

Q. 8. Is it put into this medicine in such doses as to be deleterious? A. No, sir.

Q. 9. Or is it put in in such doses as to be beneficial?

A. Beneficial.

Q. 10. You were also asked something, yesterday, regarding records kept of fruit juice manufactured at the establishment of Clinton E. Worden & Co.?

A. Yes, sir.

Q. 11. In what form are those records, as you call them, kept?

A. Just simply memorandums of my own, for my own convenience.

Q. 12. Pencil memorandums? A. No, sir.

Q. 13. What are they written in?

A. They were written in a book, a pasteboard book, an ordinary book.

Q. 14. That was under your charge in the manufacturing department? A. Yes, sir.

Q. 15. But what did you put down in that book?

A. Such memorandums as I thought would be of use to me in the future manufacture of stock, as a guide to the amount to make.

Q. 16. Did you put down in that book all this stuff that was manufactured? A. No, sir.

Q. 17. Did you put in there such memorandums as you thought would be material, or thought would be useful to you at some time? A. Yes, sir.

Q. Now, what becomes of those books or that book?

A. Well, after they become old they have been destroyed.

Q. 19. Have you got any of those books now?

A. Not in that department; no, sir.

Q. 20. What do you mean by that department?

A. Well, their laboratory is divided into various departments. Each department keep more or less of a record of their work.

Recross Examination.

(By Mr. OLNEY.)

X. Q. 1. Where are those books that you mentioned yesterday? A. They were destroyed.

R. X. 2. You haven't got them, then?

A. No, sir.

R. X. 3. When were they destroyed?

A. Last July.

R. X. 4. Of this year? A. Yes, sir.

R. X. 5. How far back did those books go that were destroyed last July?

A. I don't know, I could not state.

R. X. 6. Five years?

A. I could not state as to the time.

R. X. 7. Do you remember any time when the records kept by you were destroyed before last July?

A. Yes, sir.

R. X. 8. When?

A. I could not state as to the dates.

R. X. 9. Do you remember more than one destruction of books? A. I could not state.

R. X. 10. Did those books ever pass out of your hands?

A. Not to my knowledge.

R. X. 11. Who destroyed them? A. I did.

R. X. 12. What did you mean then when you said that they were not in your department?

A. I didn't state that they were not in my department.

R. X. 13. What?

A. I didn't state that they were not in my department.

R. X. 14. What did you state in that connection?

A. In answer to a query as to whether I kept any records, I said, yes.

R. X. 15. You spoke about these books and you said they were not in your department? A. No, sir.

R. X. 16. What books did you have reference to if you didn't have reference to the records kept of the quantity of material or stuff manufactured? What other books did you have reference to when you answered that question?

A. The laboratory is divided into departments and each department has more or less of a record of their work.

R. X. 17. How did you destroy those books?

A. I burned them up.

R. X. 18. Was there many of them?

A. Yes, sir.

R. X. 19. Running back for a considerable period of time, were they not? A. Yes, sir.

R. Q. 20. Did those books also contain a record of the quantity of laxative fig syrup which had been manufactured? A. I don't know.

R. X. 21. You don't know? A. No.

R. X. 22. You did manufacture laxative fig syrup, did you not? A. Yes, sir.

R. X. 23. It was done under your supervision?

A. Yes, sir.

R. X. 25. You kept an account of the amount manufactured, did you not? A. No, sir.

R. X. 25. You did not? Was any account kept?

A. No, sir.

R. X. 26. None was kept at all.

A. Not by me.

R. X. 27. Not by you? A. No, sir.

R. X. 28. Was any account kept by anybody?

A. Not to my knowledge.

R. X. 29. Still, the manufacture was done under your direction? A. Yes, sir.

R. X. 29. Do you aim to keep an account of all the materials you manufacture in your establishment?

A. No, sir.

R. X. 30. What parts do you keep an account of?

A. We keep an account of tablets and pharmaceuticals as a guide for stock-taking.

R. Q. 31. What?

A. As a guide for stock-taking.

R. X. 32. That is all?

A. That is all.

R. X. 33. Don't you take account of stock of other preparations made by you except those you have mentioned? A. In a way, yes.

X. Q. 34. In a way, did you say?

A. That is, as we manufacture, and an article is new or the sale is small, why, we keep a record so as to see how much to make. But if it becomes a staple we don't keep a record any longer.

R. X. 35. Then you don't know how much of any article you manufacture when it becomes a staple?

A. No, sir.

R. X. 36. Do you know what materials are used? That is to say, do you keep a record of the materials used?

A. No, sir.

R. X. 37. Then you don't know whether these books that you destroyed last July contained a record of the quantity of laxative fig syrup manufactured by you or not? A. No, sir.

R. X. 38. Do you know whether or not they contained a record of the quantity of fig juice manufactured by you?

A. I know that they contained some record of it, but whether of all or not I could not tell.

R. X. 39. Are you keeping such a record book now?

A. Not of all departments; no, sir.

R. X. 40. Well, of all the manufacturing department?

A. There are several.

R. X. 41. You keep several record books, do you?

A. I keep one; yes, sir.

R. X. 42. Do you keep a record now, at the present time, of articles manufactured in that department?

A. I keep a record of only one department, myself, now.

R. X. 43. What department is that?

A. Tablets.

R. X. 44. What? A. Tablets, triturates.

R. X. 45. That is the only one you keep?

A. That I keep myself; yes, sir.

R. X. 46. Is there any other kept of the article manufactured in your establishment that you know of?

A. Yes, sir.

R. X. 47. What are they?

A. Fluid extracts and pills.

R. X. 48. Fluid extracts and pills. Now, is there any other? A. Not that I know of.

R. X. 49. None other that you know of?

A. No, sir.

R. X. 50. How long since your establishment ceased to keep a record of the articles manufactured?

A. We never kept an accurate record of everything manufactured.

R. X. 51. Did you keep a substantial record of everything that was manufactured?

A. No, sir; more of a memorandum, as I stated, for the purpose of stock-taking.

R. X. 52. Still you kept it, as you testified yesterday?

A. I said I kept a memorandum for the purposes of stock.

R. X. 53. Was that the extent of your testimony as you understand it? A. Yesterday; yes, sir.

R. X. 54. You didn't state then that you kept a record of the articles manufactured in the concern?

A. I didn't state that I kept a record of everything; no, sir.

R. X. 55. Have you made an examination since you were on the stand yesterday to ascertain whether you had any record of fig juice manufactured by the company?

A. Yes, sir.

R. X. 56. Did you find any such record?

A. I found that we had bought figs at different times.

R. X. 57. How long back? How far back?

A. I think it was in 1888.

R. X. 58. Were you connected with the establishment in 1888? A. Yes, sir.

R. X. 59. You found that you had made a purchase of some figs in 1888? A. Yes, sir.

R. X. 60. Did you find any other record of fig juice having been manufactured? A. Yes, sir.

R. X. 61. Did you find any record of fig juice having been manufactured?

A. No; no record of any other juice having been manufactured.

R. X. 62. But you did find a record of some figs having been purchased? A. Yes, sir.

R. X. 63. What were the dates of those purchases?

A. I didn't see any dates except 1888 and 1887.

R. X. 64. Do you know whether or not there is any record of any figs having been purchased subsequent to those dates?

A. No, sir; I don't know. There are a great many things purchased for cash without a record.

R. X. 65. What things are you in the habit of purchasing for manufacturing purposes that you don't keep a record of?

A. Things that are bought for cash, especially in the line of fruit which was bought on the open market.

R. X. 67. You don't keep any record, then, of those articles which you bought for cash?

A. I do not; no, sir.

R. X. 68. Is there anyone in the establishment that does? A. Not that I know of.

R. X. 69. How long have you been in the habit of labeling the fig juice that you manufacture?

A. Since its first manufacture.

R. X. 70. Since its first manufacture?

A. Yes, sir.

R. X. 71. Then you used the same label? That is, printed at the same time? A. Yes, sir.

R. X. 72. You have a stock of those on hand, have you? A. Yes, sir.

R. X. 73. Do you know how long you have had those labels? A. I think in 1888.

R. X. 74. You have got a record of that purchase, have you?

A. Well, I have a record of the estimate of cost of the fig juice made in 1888. That is the only record I could find.

R. X. 75. You have no record of the labels having been purchased in 1888?

A. Well, we print our own labels.

R. X. 76. You print your own labels?

A. Yes, sir.

R. X. 77. Do you do your own printing?

A. Yes, sir.

R. X. 78. Does the establishment keep a record of the printing done? A. Not that I know of.

R. X. 79. You have a printing establishment in your own house, do you? A. Yes, sir.

R. X. 80. You set up the type? A. Yes, sir.

R. X. 81. And print them yourselves?

A. Yes, sir.

R. X. 82. Did you ever have a label printed with the words "Fig juice" on it?

A. Not that I know of I have no recollection so far back.

R. X. 83. Here is the label on defendant's exhibit No.

2. The words are written in ink, "Fig Syrup for soda fountain use." When were those words written there?

A. Yesterday.

Redirect Examination.

(By Mr. MILLER.)

R. Q. 1. Where was this stuff that is contained in the bottle labeled "Fig juice" taken from yesterday?

A. Taken from a case of fruit juice.

R. Q. 2. From the stock that was on hand?

A. Yes, sir.

R. Q. 3. I presume it was brought down here simply as a sample, was it? A. Yes, sir.

R. Q. 4. I presume there is a regular bookkeeper in that establishment, is there not? A. Yes, sir.

R. Q. 5. Do you have anything to do with the books?

A. No, sir.

Recross Examination.

(By Mr. OLNEY.)

R. X. 1. When was that fig juice manufactured from which that sample was taken?

A. I could not state.

Examination in chief of

HARRY N. GRAY, a witness called on behalf of respondents; sworn.

(By Mr. MILLER.)

Q. 1. Please state your name, age, residence, and occupation.

A. Harry Nathaniel Gray; my residence is the California Hotel; my occupation, I am a contractor; I also operate quarries.

Q. 2. How long have you resided in California?

A. I have resided here twelve years, about.

Q. 3. During all that time have you been engaged in this same business? A. Yes, sir.

Q. 4. That is, the business of a contractor?

A. Yes, sir.

Q. 5. What is the name of your firm?

A. Gray Brothers.

Q. 6. Do you know anything about pharmacy and chemistry? A. Not as an expert; no.

Q. 7. Have you ever studied pharmacy?

A. I never studied it.

Q. 8. Did you ever study medicine? A. No, sir.

Q. 9. Did you ever know an article of medicine on the market called "Syrup of Figs"?

A. I have known of it; I have seen it.

Q. 10. You have seen it?

A. Yes, sir; I have seen it in the stores. I have seen it advertised.

Q. 11. Have you ever taken any of it?

A. I never took any of it; no.

Q. 12. You don't know anything, of your own knowledge, then, about what its ingredients are, do you?

A. I only know—I suppose it is syrup of figs.

Q. 13. But I mean to say, you don't know positively, of your own knowledge, what the ingredients actually are?

A. No, I never saw it made.

Q. 14. You never saw it made. You never saw it analyzed, either, did you?

A. No, I never saw it analyzed.

Q. 15. I will ask you this question: Are you aware of any popular impression amongst people regarding the supposed laxative qualities of figs?

A. I know that the general impression is that they are laxative.

Q. 16. How long have you known of that impression?

A. I have known of it all my life; not all my life; I have known of it a good while, have known that figs are good for some things.

Q. 17. Now, when you first heard this name "Syrup of Figs," what did you suppose the article was, from hearing that name?

(Objected to as incompetent, irrelevant, and immaterial.)

A. I supposed it was a syrup made from the fruit of figs.

Q. 18. That was the impression? That was the impression which it produced on your mind, was it?

A. Yes, sir.

Q. 19. If you were to see a bottle in the drug store

labeled "Syrup of Orange," what would you suppose was in the bottle?

(Objected to as incompetent, irrelevant, and immaterial.)

A. I would suppose it was a syrup made from the fruit.

Q. 20. What would you suppose if you saw a bottle labeled "Strawberry Syrup," or "Syrup of Strawberries"? What would you suppose in regard to that?

(The same objection.)

A. I would suppose that it was made from the fruit of strawberry.

Q. You are familiar with syrups, such as strawberry syrup and raspberry syrup and fruit syrups of that kind, are you not?

A. Yes, sir; that is, I know something about them.

Q. 22. You have seen those syrups on sale at soda water fountains, have you?

A. Yes, I used to drink a good deal of it once.

Q. 23. You say that if you saw a bottle for the first time labeled "Syrup of Figs" or "Fig Syrup," the impression that would be produced on your mind from that name alone, you not knowing of the actual constituents would be that it was a syrup made from a fruit, the fig?

A. Yes, sir.

Q. 24. That would be about on a par with your seeing a barrel of cement, a barrel labeled cement, you would suppose that it contained cement?

(The same objection.)

A. Yes, sir; I would suppose so.

Cross-Examination.

(By Mr. OLNEY.)

X. Q. 1. Who asked you to testify in this case?

A. No one asked me to tesify in this case.

X. Q. 2. Who aked you to come here?

A. I was asked by Mr. Worden if I had ever heard of "Syrup of Figs," and I told him that I had seen it advertised and seen the bottles with the labels.

X. Q. 3. When did you first hear that I was connected with this case?

A. Just this moment.

X. Q. 4. Then you knew that I was connected with this case?

A. This is the first I ever knew of it, seeing you here.

Mr. OLNEY.—It is no pleasure to me, I am sure.

The WITNESS.—Well, it is none to me, I can assure you. But it makes no difference to me.

Examination of

F. C. KEIL (recalled).

(By Mr. MILLER.)

Q. 1 You were examined yesterday on a book called the Pharmacopia Universalis and you had only the second volume of it at that time? A. Yes, sir.

Q. 2. Will you now produce the first volume of it relating to that subject matter?

A. You have it in your hand.

Q. 3. This is the one that you now produce, is it?

A. This is the one which I now produce. It is a universal pharmacopia printed in Weimar in 1832, first volume.

Q. 4. Now what do you find in this first volume relating to the subject-matter that you found in the second volume yesterday?

Q. 5. I find printed in Latin, "A decoction of figs," or as it is called in French, "Tisana of Pectoral fruits."

Q. 5. (By Mr. OLNEY.)—Pectoral?

A. Yes, something pertaining to the chest.

Q. 6. Mr. MILLER.—Read the whole of it.

A. It says later on: "Dried figs, 1 ounce, water, 1 pound cook and strain." Then it says in German: "Softening, lingering, a chest remedy to be drunk by the glass."

Q. 7. What was the matter that you found in the second volume of the book, yesterday?

A. It was a liquid confection of senna and figs.

Q. 8. And this first volume, I understand that you have just read from, further describes it?

A. In the first volume it is described under "Figs." In the second volume it is described under "Senna."

Q. 9. Now, Dr. Lengfeld referred yesterday to a work on pharmacology and therapeutics and materia medica, by T. Launder Brunton. Is this the book referred to which I now hand you? A. Yes, sir.

Q. 10. Will you please read from that book into the record the references therein pertinent to the matter of laxatives, and especially as regards any laxative properties of figs or other substances?

A. Under the head of purgatives it says, "Most articles of food which leave a large indigestible residue in the stomach, act as laxatives, which are oatmeal, bran bread, bran biscuits. Articles of food also which contain salts, of vegetable acids and sugar in considerable quantities also act as laxatives. ' The chief laxatives are"—referring I presume to that.

Q. 11. Just read it as it is.

A. "Honey, treacle, ginger-bread, manna, cassia, tamarinds, figs, prunes, sulphur, magnesia, castor oil; and, in small doses, figs, raspberries, and strawberries, in addition to containing sugar and vegetable acids have a number of small seeds which are absolutely indigestible, and these have probably a mechanical action in stimulating the bowels."

Q. 2. What you have just read is on page 338 and 339, I believe?

A. On page 338 and 339, yes, sir.

Q. 13. Now, will you please read from that book anything else that you find there about figs?

A. On page 897, heading "Artocarpeae" "Ficus U. S. P. Fig—the fleshy receptacle of ficus carrica, bearing fruit upon its inner surface."

"Ficus B. P. Fig. The dried fruit of ficus carrica, B. P. compressed, of a regular shape, fleshy, covered with an efflorescence of sugar, of a sweet fruity odor and a very sweet mucilaginous taste. When softened in water, figs are pear-shaped, with a scar or short stalk at the base and a small scaly orifice at the apex; hollow internally; the inner surface covered with enormous yellowish, hard, achenes.

"Composition—grape sugar (about 70 per cent) a little gum and fatty matter.

Proportions: U. S. P., Confectio Sennae; Dose, 60 to 120 grs.; B. P., confectio sennae; Dose, 60 to 120 gr. Use. Figs are used locally as poultices by splitting them and applying them to the inflamed part, as in gum boils, dental absesses, etc. Figs are chiefly employed as a domestic laxative. They are useful, given is large quantities, when a person has swallowed a hard substance, by forming a bulky mass which will sheath the substance and protect the intestines from injury. In such cases, purgatives are to be avoided."

Q. 14. Just state what is the title of the book which you have been reading from.

A. It is a book on pharmacology, therapeutics, and materia medica, of T. Lauder Brunton, M. D., D. S. E., F. R. S., Philadelphia, 1885.

Q. 15. Now, I hand you respondent's exhibit No. 6, which is the formula used by Clinton E. Worden & Co., in the manufacture of laxative fig syrup, and ask you if you are familiar with that?

A. I have seen this formula in the office.

Q. 16. What is the object, if you know, of the ground henbane that is used in the compound?

A. The object of the henbane is to prevent any possible griping which is liable to arise from senna.

Q. 17. Is the henbane there in such proportions as would render it dangerous? A. No.

Q. 18. Is there any other substance put in there also for the purpose of preventing griping?

A. Oil of peppermint and ginger. I should consider the two chief articles to prevent griping besides henbane.

Q. 19. Now, I will hand you respondent's exhibit No. 5, containing the formula of the California Fig Syrup Company, and ask you to point out what difference you find between the two formulas.

Mr. OLNEY.—We object to that as irrelevant and immaterial, and asking for a comparison upon a subject where no comparison by the witness is needed.

A. There is no henbane in the second formula, and there is no peppermint oil and no definite proportions of ginger.

Q. 20. State any substantial difference in a medical sense between the two preparations?

A. Formula 1 submitted will probably be less griping in its effects.

Q. 21. Would that be about the only difference between the two.

A. I have not figured up the proportions of senna, so I can't say positively whether it will be as active.

Q. 22. Do you mean that one might possibly be more active than the other?

A. More active than the other.

Q. Do you find any other differences between the two?

A. I can't say by casual examination of the formulas.

Q. 24. When did you first see this formula which has been put in evidence here as exhibit No. 5?

A. I saw it when handed to me by you.

Q. 25. How long ago?

A. I don' know; about ten or fifteen minutes.

Q. 26. Then I shall ask you to take a copy of the formula with you and study it over in comparison with your own formula, and I will recall you again after you have studied it.

Recross Examination.

(By Mr. OLNEY.)

R. X. 1. Mr. Keil, in reading the two first formulas to which your attention was called, you described one as a confection of senna. And I understood you to say that the other was the same thing under the name of figs. Is that correct or not?

A. No, that is not correct.

R. X. 2. What is the other one that is contained in the first volume?

A. The one contained in the first volume of the Universal pharmacopia is a decoction of figs.

R. X. 3. That is the name which is applied to it, is it?

A. That is the name which is applied to it.

R. X. 4. And is different from the confection of senna?

A. Yes, sir.

R. X. 5. The ingredients are different?

A. The ingredients are different. One contains figs alone, the other contains figs, senna, cassia, etc.

R. X. 6. What is the proportion of henbane used in the formula of the respondents?

A. It is less than one per cent of the largest dose given.

R. X. 7. Less than one per cent of the largest dose? How large is a dose?

A. From one to two teaspoonsful.

R. X. 8. How much of henbane would make the dose in senna?

A. I should say about four grains.

R. X. 9. What percentage would make it unsafe?

A. About four per cent of this preparation.

R. X. 10. How much would make it dangerous?

A. About six or eight per cent.

R. X. 11. In the use of henbane, as I understand it, it is for the purpose of overcoming the griping tendency?

A. Yes.

R. X. 12. Now, does it act as a narcotic?

A. In large doses, yes.

R. X. 13. How in small doses?

A. It does not act as a narcotic.

R. X. 14. What is the effect produced by small doses of henbane?

A. It is sedative; it has a soothing effect.

R. X. 15. And to some extent a narcotic, isn't it?

A. I would never personally consider it a narcotic, except in large doses.

R. X. 16. Does it not have the same effect that opium in similar doses does? A. No.

R. X. 17. What is the difference?

A. Opium has the property of enslaving the patient.

R. X. 18. I am talking about the physical effect upon the human body of a small dose of henbane and the same amount of opium, and I ask if the effect is not the same?

A. No.

R. X. 19. What is the difference?

A. You have to give a considerable smaller dose of opium to produce the same effect as would be produced by henbane.

R. X. 20. You can, however, by regulating the size of the dose, produce the same effect, can you not?

A. That I am unable to tell.

R. X. 21. Well, as a pharmacist, is that not your opinion, that the effect would be substantially the same, provided you regulate the size of the dose of each material so as not to produce any dangerous effect upon the patient?

A. My practical experience is not that.

R. X. 22. Now, how much smaller would the opium dose have to be to produce the same effect as a dose of henbane; say one per cent of henbane? Now, what per cent of opium would be necessary to produce the effect, the same effect?

A. About one-fourth of one per cent.

R. X. 23. Well, now, suppose in that preparation one-quarter of one per cent of opium is introduced, would not that practically have the same effect upon a patient as one per cent of henbane? A. No.

R. X. 24. What would be the difference?

A. Opium is conceded to be constipating; henbane is a laxative, conceded to be a laxative.

R. X. 25. Is that the only difference.

A. Yes, there is a difference, which I stated before, that opium is apt to enslave.

R. X. 26. No, I am not talking about the mental effect, but the physical effect?

A. I am not prepared to state that.

R. X. 27. The sedative effect which you obtain from one per cent of henbane, however, can be obtained by one-fourth of one per cent of opium; can it not?

A. Yes.

R. X. 28. (By Mr. ROWE.)—He does not mean the effect on the medicine, but the effect on the physical system.

Mr. OLNEY.—I ask of him in regard to the sedative effect on the patient.

(At the hour of 12:30 a recess was had until 2 P. M., when proceedings were had as follows):

Examination in chief of

HENRY E. HALL, a witness called on behalf of respondents; sworn.

(By Mr. MILLER.)

Q. 1. Will you please state your full name?

A. Henry E. Hall.

Q. 2. Do you live in San Francisco, Mr. Hall?

A. Yes, sir.

Q. 3. What is your business here?

A. I am in the wholesale jewelry business.

Q. 4. Where is your place of business?

A. 530 Market.

Q. 5. How long have you been in business in San Francisco? A. About nineteen years.

Q. 6. Have you any practical knowledge of chemistry or medicine? A. No, sir.

Q. 7. Did you ever see an article on the market called "Fig Syrup," made by the California Fig Syrup Company, as a laxative?

A. I have seen some kind of an article advertised; I could not say who it was made by.

Q. 8. You have seen such an article advertised?

A. Advertised. I have never taken it that I know of.

Q. 9. You have never taken it?

A. Not that I know of.

Q. 10. Now, when you first heard of the article, or saw it advertised as "Syrup of Figs," what impression was produced upon your mind as to the constituents of that article, if any?

(Objected to as incompetent, irrelevant, and immaterial.)

Q. 11. In other words, what impression, if any, did the name create in your mind, concerning the article?

A. That it was a syrup made of figs, a syrup, sugar, etc.

Q. 12. I presume you have known and heard of other syrups, have you not? A. Yes, sir.

Q. 13. Have you ever known or heard of raspberry syrup, strawberry syrup, or syrups of that kind?

A. Yes, oh, yes.

Q. 14. Now, when the words strawberry syrup are given, what impression is made upon your mind by that name?

(Same objection.)

A. That it is a syrup made of strawberry, or strawberry juice.

Q. 15. Do you mean from the fruit of the strawberry?

A. I mean from the fruit of the strawberry, yes.

Q. 16. Now, when you hear the name raspberry syrup, or strawberry syrup, what impression is created upon your mind?

A. That it would be a syrup made from strawberries.

Q. 17. You have seen or heard of syrup of that kind, in connection with soda water fountains, have you not?

A. Yes, sir.

Q. 18. And that would be the impression that would be conveyed to your mind from first hearing it?

A. The impression was that it would be a syrup made from that particular fruit.

Q. 20. Would that same line of testimony hold with regard to the syrup of figs or fig syrup when you heard it? A. Yes, sir.

Q. 21. Would you suppose it was made from the juice of the fig, the syrup made from the juice of the fig?

A. I would, yes.

Mr. MILLER.—You can take the witness.

Cross-Examination.

(Mr. OLNEY.)

Q. 1. When was it that you saw this advertised?

A. I could not tell you that. I have seen it advertised.

X. Q. 2. Did you read the advertisements?

A. I could not tell you that.

X. Q. 3. Did you ascertain what the article was to be used for?

A. Well, I don't know that I ascertained, that I went into it that far. I imagined that—

X. Q. 4. (Interrupting.)—I am asking—

A. (Interrupting.)—I didn't ascertain anything; no, sir.

X. Q. 5. Did you know what it was used for?

A. I thought I did.

X. Q. 6. Used as a laxative medicine?

A. That is what I thought it is used for.

X. Q. 7. Would you suppose that there was enough laxative quality in a syrup made from figs to act as a medicine in medicinal doses? Or did you give it any thought at all?

A. Well, I don't know. I don't know that I gave it any particular thought.

X. Q. 8. You didn't use the medicine?

A. I did not; no, sir.

X. Q. 9. You think you knew that it was to be used as a medicine, do you?

A. I think I did; yes, sir.

X. Q. 10. Well, did you give it sufficient thought to consider whether or not a juice made from figs, a fig juice, could be a medicine if taken in medicinal doses?

A. Well, I have heard, I think, somewhere that figs were supposed to be a laxative.

X. Q. 11. You have eaten figs, haven't you?

A. Yes, sir.

X. Q. 12. You know that if the fruit is laxative at all it is only when it is eaten in large quantities, don't you?

A. Well, I don't know that I knew that.

X. Q. 13. Well, did you know that it was a laxative at all? A. I had supposed it was.

X. Q. 14. You knew nothing about it?

A. I am not a doctor.

X. Q. 15. You have frequently eaten figs?

A. Yes, quite frequently, not very frequently.

X. Q. 16. Did you suppose when you saw this medicine advertised that it was anything more than simply the juice of figs, or that it was a medicine to be taken in medicinal doses?

A. I supposed it was a medicine made from the juice of figs.

X. Q. 17. Did you really give it any thought, whatever?

A. Probably not any more thought than I would reading from any other advertisement in the paper.

X. Q. 18. You don't remember the time?

A. No, sir.

X. Q. 19. And you don't remember the impression that was made at the time, do you?

A. Beyond that fact that it was something advertised for its medicinal qualities.

X. Q. 20. You don't know where it was that you read the advertisement? A. No, sir.

X. Q. 21. You don't know whether it was in a newspaper or in a poster, do you?

A. Well, I should say it was in a newspaper.

X. Q. 22. You would say that it was in a newspaper, but you don't know that you read the advertisement, you say? A. No.

X. Q. 23. Do you know how long ago it was?

A. Oh, I have seen it a great many times, I think.

X. Q. 24. Well, when was it that this impression was formed on your mind? A. What impression?

X. Q. 25. That it was made from the juice of figs?

A. Whenever I read it?

X. Q. 26. That also made its impression on your mind, did it? A. Yes, sir.

X. Q. 27. You have never been disabused in regard to that? Or have you been told different, or learned different in any way?

A. Well, I don't know whether there is more than—when I say I have seen it advertised, I don't know whether I have seen more than one company's preparation advertised or not.

X. Q. 28. Well, assume that there are only one company's preparation advertised?

A. Yes, I have heard that there was no figs in a company's preparation.

X. Q. 29. You have heard that? A. Yes, sir.

X. Q. 30. Had you heard that about the time that you saw the advertisement? A. No, sir.

X. Q. 31. Since then? A. Yes, sir.

X. Q. 32. How long ago?

A. In the last day or so.

X. Q. 33. You haven't heard it before?

A. No, sir.

X. Q. 34. I understood you to say you never had used it at all?

A. I never have used it, sir; that is not to my knowledge. I don't remember ever having used it.

X. Q. 35. Do you know anybody having used it as a medicine?

A. No, sir. Well, let me see! I beg your pardon! I believe Mr. Miller told me he used it.

X. Q. 36. That was since you were subpoenaed in this case, wasn't it? A. Yes, sir.

Redirect Examination.

(By Mr. MILLER.)

R. Q. 1. One question I omitted to ask you. Have you heard of the popular impression that is prevalent among people as to the supposed laxative quality of figs?

A. I have always supposed that figs were laxative. I could not tell you where I obtained the impression, but I have obtained the impression—I may have obtained it from seeing this medicine, seeing this syrup of figs advertised.

R. Q. 2. You have had that impression?

A. I have had that impression for a very long time.

Examination in chief of

JOSEPH MADISON QUAY, a witness called on behalf of respondents; sworn.

(By Mr. MILLER.)

Q. 1. Mr. Quay, where do you reside?

A. The Pacific Union Club.

Q. 2. In this city and county? A. Yes, sir.

Q. 3. How long have you resided in California?

A. Thirty-two years.

Q. 4. What is your business?

A. Fiduciary agent.

Q. 5. How long have you been in that business?

A. Thirty-five years.

Q. 6. During all the time in California? A. Yes.

Q. 7. Have you any practical knowledge of chemistry and medicine? A. I have not.

Q. 8. Have you any more than the general and ordinary knowledge of those subjects than people at large are supposed to have? A. I have not.

Q. 9. Have you ever known or heard of syrups such as strawberry syrup, raspberry syrup, and syrups named after fruits? A. I have.

Q. 10. Have you seen them in drugstores in connection with soda fountains? A. I have.

Q. 11. Now, when you saw a bottle in a drugstore at a soda fountain and saw it labeled "Raspberry Syrup," what impression was made upon your mind as to the contents of that bottle?

(Objected to as irrelevant, incompetent and immaterial.)

A. Do I answer it?

Q. 12. Yes, sir.

A. It would convey to me that it was manufactured of whatever it claimed to be—raspberry, strawberry, or whatever it might be.

Q. 13. It would be just according to the name of the fruit that was in the bottle?

A. I have used raspberry and strawberry to make punches of. It tastes pretty strong of raspberry; I don't know whether it has got any raspberry in it or not.

Q. 14. It makes a raspberry taste, does it not?

A. Yes.

Q. 15. If you see a bottle labeled "Raspberry Syrup," what would be the impression conveyed to your mind?

(The same objection.)

A. That it was made of raspberries.

Q. 16. Have you ever seen or known of an article on the market called "Fig Syrup?" A. Yes, sir.

Q. 17. Where have you known about that?

A. I have seen the advertisement of it.

Q. 18. In the papers? A. Yes, sir.

Q. 19. Have you seen the advertisements of it on the walls and fences, also in the city? A. Yes, sir.

Q. 20. Those advertisements are quite common and prevalent, I believe, are they not?

A. Yes, sir; the proprietor of it built a house right alongside of a particular friend of mine. My attention was particularly called to it in that way.

Q. 21. Do you know of your knowledge what are the actual constituents of that medicine called "Syrup of Figs?"

A. No further than what I have read about it.

Q. 22. Have you ever used it for yourself?

A. I never have.

Q. 23. What impression was conveyed to your mind when you first heard the name "Syrup of Figs?"

(Objected to as irrelevant, incompetent, and immaterial.)

A. The impression was that it was a medicine and laxative, and I think it is so advertised.

Q. 24. What impression was conveyed to your mind as to any constituents of that medicine?

A. Well, I supposed it was made of figs, and was a laxative the same as any other kind of fruit.

Q. 25. Have you been aware of the popular impression among people regarding the supposed quality of figs?

A. Yes, sir.

Q. 26. How long have you been aware of such an impression as that? A. Ever since I was a child.

Q. 27. It is quite an ordinary, common impression among people, is it not? A. Yes, sir.

Q. 28. And when you saw this name, "Syrup of Figs," advertised as a laxative and when you knew of the popular impression that figs were laxative, what impression was conveyed to your mind from seeing this advertised name, "Syrup of Figs," or "Fig Syrup," as to the constituent elements, or any of the constituent elements?

(The same objection.)

A. I would suppose it was made from figs.

Cross-Examination.

(Mr. OLNEY.)

X. Q. 1. Did you observe that it was to be used as a medicine?

A. Yes, I think it is so advertised.

X. Q. 2. Did you suppose that a teaspoonful of this syrup of figs, if it was really syrup of figs, would act as a medicine, or did you give it any thought at all?

A. I didn't give it any thought at all.

Examination in chief of

CLINTON E. WORDEN, a witness called on behalf of respondents; sworn.

(By Mr. MILLER.)

Q. 1. Please state your name, age, residence, and occupation?

A. Clinton E. Worden; age, forty-six; residence, 1101 California street; occupation, manufacturing pharmacist.

Q. 2. What is the name of your institution?

A. Clinton E. Worden & Co.

Q. 3. Is that a corporation? A. Yes, sir.

Q. 4. Where is it located?

A. 214 Townsend street, San Francisco.

Q. 5. In this city and county? A. Yes, sir.

Q. 6. What is the general nature of your business?

A. Manufacturing all sorts of pharmaceutical preparations.

Q. 7. State, generally, about how many different preparations you manufacture?

A. I should think in the neighborhood of something from seven thousand to ten thousand.

Q. 8. When did you start into that business in San Francisco? A. About 1883.

Q. 9. Did you come to California at that time?

A. No, sir; two years before.

Q. 10. From what place did you come when you came to California? A. Detroit.

Q. 11. What business were you engaged in at Detroit?

A. Manufacturing pharmaceutical preparations with Frederick Stearns Co.

Q. 12. Who are Frederick Stearns & Co.?

A. Manufacturing pharmacists in Detroit.

Q. 13. And you have been employed by them?

A. Yes.

Q. 14. In what capacity did you come to San Francisco? A. I came first as their representative.

Q. 15. What did you do for them here?

A. Sold pharmaceutical preparations.

Q. 16. Were you manufacturing here at that time?

A. No, sir.

Q. 17. How long did you continue to sell for them?

A. About one year. The next two years before manufacturing I purchased and sold the goods myself.

Q. 18. From whom did you purchase them?

A. From Frederick Stearns & Co.

Q. 19. In what year did you start in to manufacture yourself? A. I think it was in 1883.

Q. 20. I understand you have been manufacturing ever since you started? A. Yes, sir.

Q. 21. You have built up quite a large business and trade? In what section of the country did you trade?

A. All over the western States, Australia, South America and countries adjacent to this Coast.

Q. 23. When did you first hear of a preparation, a laxative preparation, called "Syrup of Figs?"

A. The year, do you mean?

Q. 24. Yes.

A. Well, I first heard of it as an advertised article, I should say, seven or eight years ago.

Q. 25. Did Frederick Stearns & Co. ever manufacture an article called "Syrup of Figs?" A. Yes, sir.

Q. 26. When were they manufacturing?

A. I should say that they manufactured for ten or twelve years.

Q. 27. When did you commence to manufacture an article called "Syrup of Figs?"

A. And put it on the market as syrup of figs?

Q. 28. Yes.

A. After the suit of the California Fig Syrup Company against Frederick Stearns & Co. had been decided by the United States Circuit Court of Appeals.

Q. 29. There was a suit then between the California Fig Syrup Co. and Frederick Stearns & Co., was there?

A. Yes, sir.

Q. 30. And after that suit was finally determined, you put the article on the market, did you? A. Yes, sir.

Q. 31. Had you had a call for that article before that time? A. Yes, sir; many of them.

Q. 32. What did you do then?

A. Declined to put them up to fill the orders.

Q. 33. Why was it you declined?

A. I didn't know that I had a legal right to put them up.

Q. 34. When did you commence to put them up—what induced you to put them up then?

A. The decision of the United States Circuit Court of Appeals in the East. I supposed after that decision that I had a right to put it up for my customers.

Q. 35. Where did you hear of that decision?

A. I think first through the daily press, and afterward, undoubtedly, through the "Pharmaceutical Era."

Q. 36. What is the "Pharmaceutical Era"?

A. The "Pharmaceutical Era" is a pharmaceutical publication published in New York for the benefit of the druggists of the country. It has a large circulation.

Q. 37. Was that decision mentioned in that paper?

A. Yes, sir.

Q. 38. Did you read it in that paper? A. I did.

Q. 39. Did you understand from reading that paper that any one had a right to put up the article called "Syrup of Figs"?

(Objected to as incompetent, irrelevant, and immaterial.)

A. I did.

Mr. OLNEY.—The witness' understanding is altogether immaterial.

Q. 40. (By Mr. MILLER.)—It was after that that you commenced to put it on the market as syrup of figs, was it? A. It was.

Q. 41. You have seen this formula here under which the article is put up in your establishment, have you?

A. Yes, sir.

Q. 42. Is that a correct formula?

A. That is a correct formula.

Q. 43. Now, what style of article is produced according to that formula? A. A laxative.

Q. 44. Is it an efficient laxative? A. Very.

Q. 45. How does it compare in quality with the laxative put up by the California Fig Syrup Company, called by them their "Syrup of Figs"?

(Objected to as incompetent, irrelevant, and immaterial; also, because it is not a matter within the knowledge of this witness.)

A. I would suppose that it would be a better preparation because it is not apt to be as griping.

Q. 46. What do you put in it to prevent its griping?

A. The licorice and henbane. The California preparation has the licorice, but I am told by my chemist that it has not the henbane.

Q. 47. What character of materials did you use in the preparation of this article? A. The very best.

Q. 48. What character of men as to competency do you employ in your manufactory?

(The same objection.)

A. The very best.

Mr. OLNEY.—There is no issue in this case as to the character of the defendant's employés.

Mr. MILLER.—I will say that if I remember the pleadings correctly, they state that we put a worthless and spurious article on the market that is dangerous to the system. If counsel desires to admit that our article is as good as his, then I have no objection to withdrawing the question.

Q. 49. Now, Mr. Worden, is there an article of trade or commerce in your line of business known as fig juice?

A. Yes, sir.

Q. 50. What is it used for?

A. Particularly for soda water syrup for flavoring, whenever the flavor of the fig is desired.

Q. 51. Have you from time to time manufactured such an article? A. Yes, sir.

Q. 52. For how many years have you been manufacturing such an article as that?

A. Well, for ten or more years.

Q. 53. Have you sold that article to the trade?

A. Yes, sir.

Q. 54. Do you keep it in stock? A. Yes, sir.

Q. 55. Does this bottle which has been offered in evidence, respondent's exhibit No. 2, and labeled "Fig Juice," represent that article? A. Yes, sir.

Q. 56. Here is another bottle that has been marked "Respondent's Exhibit No. 2," and labeled "Fig Syrup for Soda Fountain use." Just state what that article is, and how it is made?

A. That is made from the juice, with the addition of syrup, *from the fig juice with the addition of syrup.*

Q. 57. What does the syrup consist of? that is added?

A. White sugar and water.

Q. 58. So that the real difference between these two articles in the bottles one and two is, that bottle No. 1 is simply the pure fig juice, and bottle No. 2 contains the fig juice with the syrup added? A. Yes sir.

Q. 59. How is this fig juice in the bottle No. 2 used in soda water fountains?

A. It is drawn into the glasses before the customer designates the flavor that they wish the soda water to be, and is drawn into the glasses, and the soda water is drawn on top of the syrup.

Q. 60. Is it so in the same way that strawberry and other syrups are used there? A. Identically.

Q. 61. It is used for other flavoring purposes besides soda water? A. Yes, sir.

Q. 62. Now, please state what is the general custom in your establishment when manufacturing articles for different druggists to order?

A. Besides manufacturing a full line of pharmaceutical preparations such as physicians use, we manufacture anything else that the druggist may require in his business. He may want a cough remedy, he may want a blood purifier, he may want cathartic pills, he may want some patent toilet preparation, and, his facilities being limited, he comes to us and asks us to submit to him some formulas for his selection, or submits a formula to us, and we make him a price, then he designates a name that he would like to have that preparation called, and, if it is within the bounds of law, we manufacture it for him. If it is not, we decline always to put it up.

Q. 63. What name do you put on it then?

A. Whatever name he may select.

Q. 64. Then your name would not appear on that article at all?

A. Sometimes they prefer to have our name, while we would not prefer to use our name; we have, in some instances, used our name.

Q. 65. In other instances your name does not appear at all?

A. In the majority of instances our name does not appear.

Q. 66. But only the name of the druggist, or such name as the druggist may select for his own purposes?

A. May select; yes, sir.

Q. 67. In manufacturing and selling this laxative fig syrup which you have made since the decision in the Fred-

erick Stearns case have you sold it generally yourself, or made it to order?

A. We have made it upon the inquiry of our customers, and I presume my salesmen have offered it to them.

Q. 68. You have no drugstore of your own, have you?

A. Just a manufacturing plant.

Q. 69. Except the manufacturing establishment, I mean?

A. No, sir; we have a branch of our establishment in Los Angeles, where we carry our products.

Q. 70. You say you have a branch house in Los Angeles? A. Yes, sir.

Q. 71. Now, a package has been put in evidence here by complainant as complainant's exhibit "U," in the California Fig Syrup case, prepared by the Yetiva Drug Company of Louisville, Kentucky, and it is claimed that that is manufactured by your establishment. I will ask you what you know in regard to that, what you have to say?

A. I am told by my—

Q. (Mr. OLNEY.)—Just one moment. What you are told is not evidence.

The WITNESS.—You must understand that that is the only way I can tell you. I can't tell you all the details of my business. I have a large number of traveling men. It is not supposed that I should go and sell these things myself. I am told by my representatives that sell it—

Mr. OLNEY (interrupting).—I move to strike that out.

Mr. MILLER.—Then I suppose you don't want us to admit that you have made and sold it?

Mr. OLNEY.—You have already admitted that on the record.

Mr. MILLER.—We have not admitted anything of the kind.

Q. 72. Who, in your establishment, would know the facts in regard to this package?

A. By looking up the order sheet I could find out whether it came by mail or whether it came through an agent; if so, what agent sold it.

Q. 73. You don't know of your own knowledge, then, concerning this package? A. No, sir; I do not.

Q. 74. Would that testimony apply to these other packages here that have been put in evidence?

A. Yes, sir; it is reasonable to suppose that we did, because we did turn out such preparations.

Q. 75. Prior to the bringing of this suit, were you notified by the California Fig Syrup Company that they considered you were infringing upon their rights in any way, and to desist from it?

A. I think some number of months ago an attorney—I don't think it was Mr. Olney—wrote and said that he would like to see me at his office. I replied that I could not go to his office, but I would be pleased to see him at my office at any time that he would designate.

Q. 76. How long ago was that?

A. I should say about the time, or soon after this suit of Frederick Stearns, if my recollection serves me.

Q. 77. Soon after what?

A. The "Fig Syrup" case; the suit against Stearns.

Q. 78. Did you ever receive any formal notification from the California Fig Syrup Company in that respect?

A. No, sir; I never received one.

Cross-Examination.

(By Mr. OLNEY.)

X. Q. 1. Do you remember receiving a letter from me notifying you that you must not manufacture or sell an imitation of complainant's medicine?

A. I do not. It may have been received at the office, but I don't remember any such letter.

X. Q. 2. You heard of the suit brought by the California Fig Syrup Company against the Improved Fig Syrup Company, did you not?

A. I heard of it; yes, sir.

X. Q. 3. You heard that that had been decided by the Circuit Court of Appeals of this circuit, too?

A. Not definitely. I didn't pay much attention to it.

X. Q. 4. What did you hear about it?

A. Very little; only that there was such a suit; I could not swear that the suit had ever been through the United States Court of Appeals.

X. Q. 5. But you knew that there was such a suit?

A. I knew that there was a suit brought by the California Fig Syrup Company against a man who had a retail store over out at Oakland. That and the Stearns suit were the only two that I ever knew anything about.

X. Q. 6. You knew that this suit that you speak of against this man who had a retail store over in Oakland was here in this circuit? A. Yes, sir.

X. Q. 7. Don't you know that as a matter of fact that decision, or the result of that decision, was published very generally in pharmaceutical journals?

A. I do not.

X. Q. 8. You never saw it? A. I never saw it.

X. Q. 9. It might have been published very generally without your knowing anything about it?

A. I could not have told if the suit had ever terminated. I knew the man was a very small druggist over there, and I didn't know what had become of it.

X. Q. 10. Now, you had declined orders, as I understand, before the decision in the Stearns case?

A. Before the Stearns case.

X. Q. 11. You declined for the reason that you did not suppose that you had a legal right?

A. I was not sure.

X. Q. 12. That was the reason you declined?

A. That was the reason I declined. I was not sure, and I was not in any position at that time to carry on litigation.

X. Q. 13. And you did decline whenever an order of that kind was given you until after you heard of the Stearns decision?

A. I did. I never put up a bottle—

X. Q. 14. (Interrupting.)—Then you made up your mind, did you not, that you would see if you could not reverse the decision here in California?

A. No, sir; I didn't do anything of the kind.

X. Q. 15. Didn't you have that in mind at that time?

A. No, sir; I was acting on the decision in the East.

X. Q. 16. But you knew there had been a decision here in California? A. I did not.

X. Q. 17. You knew there was such a suit. Did you make any inquiries as to the result of that suit?

A. I could not swear that that suit was before or at that time or since.

X. Q. 18. That is not the question. Did you make any inquiries as to the result of that suit?

A. No, sir.

X. Q. 19. Now, I understand you to say that those exhibits introduced here by the plaintiff, and mentioned in the bill of complaint were prepared by your establishment?

Mr. MILLER.—We object to that question because the witness was asked on direct examination and counsel objected to it on the ground that he did not know of his own knowledge. I withdrew the question, and stated that I would prove it by another witness.

Mr. OLNEY.—I will state on the record that that was not the question I asked of the witness.

X. Q. 20. Do you know whether or not these articles that are attached as exhibits to the complaint were manufactured by you or your concern upon orders given you by other parties, whether they were manufactured and put upon the market by you without any previous order having been received?

A. We never put any preparation of that kind on the market without first having received an order.

X. Q. 21. Did you have salesmen out receiving orders? A. A number of them.

X. Q. 22. Then, so far as these particular bottles that are in evidence here, you don't know whether they were ordered by the respective drugstores to whom you sold them without any previous solicitation on your part, or whether the order was solicited by your salesmen?

A. I do not. That can be determined, however, by reference to my books—determined whether they came by mail or whether they came through an agent. We have got down there two or three hundred files of orders. I can find any of them within a reasonable length of time.

X. Q. 23. Will you produce the orders under which you sold these articles that are attached to the exhibits already introduced in evidence?

A. With pleasure.

(Further hearing adjourned to Thursday, December 29, 1898, at 11 A. M.)

Friday, December 30, 1898, 10 A. M.

Counsel appearing:

For complainant, Warren Olney, Esq.

For respondents, John H. Miller, Esq., Purcell Rowe, Esq.

Examination in chief of

MATTHEW GARDINER, M. D., a witness called on behalf of respondents; sworn.

(By the EXAMINER.)

Q. 1. State your full name?

A. Matthew Gardiner.

Q. 2. What is your age, residence and occupation?

A. I am fifty-two years of age. I am a physician and surgeon by occupation.

Q. 3. What is your residence?

A. San Francisco.

(By Mr. MILLER.)

Q. 4. You are a practicing physician, I believe, doctor? A. Yes, sir.

Q. 5. How long have you been practicing your profession? A. Twenty-six years; a little over.

Q. 6. At what place or places?

A. In California nearly altogether.

Q. 7. Of what college are you graduated?

A. McGill University, Montreal.

Q. 8. What is your special line of practice now?

A. Well, for the last five years, or between four and five years, I have been chief surgeon for the Southern Pacific, Market Street Railway Companies.

Q. 9. As such, what are you called on to do in your profession?

A. Well, I have supervision of the entire medical department.

Q. 10. Have you physicians under you?

A. Yes, sir.

Q. 11. Quite a number of them?

A. In the neighborhood of one hundred or one hundred and fifty.

Q. 12. And you have general supervision over the whole matter, have you? A. Yes, sir.

Q. 13. Have you heard of the preparation known as the "Syrup of Figs"? A. I have.

Q. 14. In what connection have you heard of it?

A. Well, mostly from advertisements that I have seen on the bill-boards and in the papers.

Q. 15. Have you ever prescribed it to your patients in your practice? A. No, sir.

Q. 16. Do you know of any reputable physicians who have prescribed it?

A. Not of my own personal knowledge.

Q. 17. Would you prescribe it in your practice?

(Objected to as incompetent, irrelevant and immaterial.)

A. I would not.

Q. 18. You may state why?

A. Well, I look on "Syrup of Figs" as I do on a great many of those patent medicines, as a quack remedy. We don't know what they contain.

Q. 19. Do you regard it as a quack medicine?

A. I do.

Q. 20. What do you call quack medicines?

A. A preparation the contents of which is not known to either the physicians or the public.

Q. 21. Do you know of any popular impression that exists among people at large regarding the supposed laxative qualities of figs?

A. Well, figs, like a great many other fruits, as an article of diet, are looked on as a laxative.

Q. 22. Have you met with such belief or impression amongst the people, that is, the impression that figs are a laxative?

A. Well, the impression, I do not presume, is general. I have no doubt I have met numbers of people who

thought figs were a laxative, as it is claimed that even apples are laxative, or peaches. We all know that green apples are laxative sometimes.

Cross-Examination.

(By Mr. OLNEY.)

X. Q. 1. I suppose, doctor, that you would not prescribe any of these advertised remedies commonly called patent medicines? A. No, sir.

X. Q. 2. Suppose you knew what the ingredients of the medicines were, and were satisfied that it was a good medicine, would you then refuse to prescribe it because it was an advertised medicine?

A. It would depend entirely on the source of my information. If it was from the United States "Dispensatory" or the British "Pharmacopia" I would do it.

X. Q. 3. You would not prescribe it if it was not from any other source than those you have mentioned.

A. No, sir.

X. Q. 4. If you knew of your own knowledge that it contained no injurious ingredient, but did contain elements that would make it a good medicine for the purpose for which it was advertised, would you in that case refuse to prescribe it?

A. If you will allow me to ask the question, how would I obtain that knowledge?

X. Q. 5. I am asking you the question, if you knew?

A. Well, there is only one source, and that would be through an analytical chemist, and I am not that.

X. Q. 6. Assuming that you knew it. Now, answer the question.

(X. Q. 4 read.)

A. Yes, sir, I would.

X. Q. 7. Why?

A. I am quite as competent to compound my own medicines and to write out my formulas as anybody else.

X. Q. 8. Now, as I understand, the reason you call it a quack medicine is because its contents are not generally known to the public?

A. They are not generally known, as I understand it.

X. Q. 9. How is that?

A. I understand they are not known.

X. Q. 10. Yes, sir. Well, that is the reason you call it a quack medicine?

A. Yes, sir; the ingredients are uncertain.

Redirect Examination.

(By Mr. MILLER.)

R. Q. 1. It has never been made known to you as a medical man, has it, the contents?

A. Well, I have seen the formula, the supposed formula. I don't know whether it is correct or not. It was published in one or two medical journals, but I have forgotten it now.

R. Q. 2. It is not made known to the public generally?

A. Not that I am aware of.

R. Q. 3. But it is sold and advertised on the same basis as other quack medicines, is it?

A. I believe it is.

R. Q. 4. Have you ever been called on by any representative of the California Fig Syrup Company and had the contents of this medicine explained to you?

A. No, sir.

R. Q. 5. When you saw those advertisements in the medical journals, was publication made of anything else than of senna as its principal ingredient?

A. I don't remember the publication correctly, but it seems to me there were eight or ten ingredients.

R. Q. 6. You don't recollect them?

A. I do not; just at this moment I do not.

R. Q. 7. And that was in one of these medical journals?

A. Oh, I think in one of them the ingredients were published. I think one of them was jalop as a purgative, and something else. I have forgotten. But I think that was given as one of them.

R. Q. 8. Jalop, I understand you to say, is a purgative?

A. Yes; it depends upon the dose.

Examination in chief of

W. M. SEARBY (resumed).

(By Mr. MILLER.)

Q. 43. Mr. Searby, you have already given some testimony in this case? A. Yes, sir.

Q. I now hand you a formula for the preparation of "Fig Syrup," marked "Respondent's Exhibit No. 5," and I also hand you another formula, being respondent's exhibit No. 6 for the manufacture of "Fig Syrup," and ask

you to examine those two and state if you understand the same, and how to compound the preparation therefrom?

A. What is it you wish to know? (Question 43 read.) Yes, sir, I understand them; and, also, how to prepare them from these formulas.

Q. 44. Now, in your judgment as a chemist, you may state from which of those two formulas could the better preparation be compounded?

(Objected to as incompetent, irrelevant and immaterial, and not a question in issue in this case.)

A. One is much stronger than the other. I don't know that that makes much difference in the quality, but it makes a difference to the purchaser if he gets the same quantity for less money.

Q. 45. Which one is the stronger?

A. The one marked "Exhibit No. 6."

Q. 46. Now, in your judgment, as a chemist, would the preparation prepared according to formula No. 5 be any better than the preparation prepared according to formula number 6? A. I should say not.

Q. 47. How long have you been a chemist and pharmacist?

A. Oh, over forty-five years. I don't know just how long.

Q. 48. Then you have prepared a great many prescriptions, have you not? A. A great many thousands.

Q. 49. Is there anything you can discover in formula number 6 which would make it dangerous or deleterious or poisonous to a patient? A. What is the dose?

Q. 50 (By Mr. ROWE).—For an adult, one-half to one

teaspoonful; for a child, one-quarter to one-half a teaspoonful.

A. No, there is nothing in those doses, or dangerous.

Cross-Examination.

(By Mr. OLNEY.)

X. Q. 1. When you spoke of No. 6 being stronger, what is it that gives it that quality, that you say makes it stronger?

A. The increased amount of senna, which is the principal laxative and purgative ingredient in both formulas.

X. Q. 2. You say that there is no ingredient in No. 6 which would, in the prescribed doses, make it poisonous or dangerous? A. Yes.

X. Q. 3. What article is there in that formula that caused you to hesitate and inquire what the size of the dose was? A. Hyoscyamus.

X. Q. 4. What is the popular name for that?

A. Henbane.

X. Q. 5. Do chemists find that it makes a difference how a particular article is treated in making the compound or preparation in order to make it the most efficient? A. Yes; undoubtedly.

X. Q. 6. The method of treatment of an ingredient, the making up of a medical preparation is an important matter, is it not, in pharmacy? A. Yes.

X. Q. 7. Can you tell from either formula what is the method for treating senna?

A. That would be a matter of judgment or preference

with each pharmacist. Some prefer one process and some another.

X. Q. 8. Is it not possible to take the same formula for a medical preparation, using precisely the same ingredients, and by the different treatment of the ingredients in the process of compounding, make it essentially a different medicine?

A. Well, that is a very wide question. It depends. It depends a good deal on what is the menstrum used for resisting the drug.

X. Q. 9. The question was as to whether it was not possible by a different method of treatment to prepare a compound of the same ingredients and with the same proportions, that would have a different effect by using different methods of preparation?

A. You could not essentially change the nature of a finished product in either of these cases by varying the processes.

X. Q. 10. Now, in regard to the treatment of senna, would it not be possible to substantially vary the effect by treatment of the senna? That is to say, in the way that the medical quality is extracted from the article?

A. Not by use of either of these formulas. If you care to have an explanation, I will explain it more fully. If you wish to know what would take place.

X. Q. 11. Well, make your explanation.

A. Well, in one formula hot water is poured over the senna. That extracts the medicinal properties of the senna, and having once extracted it no ordinary method of treatment would injure it. In the other process the senna and hyoscyamus and figs are treated with weak

alcohol, not strong, weak alcohol, by the process called percolation and you could not materially change the character of the finished product by modifying the process. The process of percolation cannot be very greatly varied. In both cases the senna is exhausted of its medicinal qualities, one by hot water and the other by weak alcohol.

Examination in chief of

J. D. GRANT, a witness called on behalf of respondent; sworn.

(By Mr. MILLER.)

Q. 1. What is your full name? A. J. B. Grant.

Q. 2. What is your business? A. Merchant.

Q. 3. With what firm are you connected?

A. Murphy, Grant & Co.

Q. 4. How long have you been in business in San Francisco? A. About twenty years.

Q. 5. What line of business is that of Murphy, Grant & Co.? A. Dry goods.

Q. 6. They never have anything to do, I presume, with medicines or drugs as a matter of sale, do they?

A. They do not.

Q. 7. Have you ever been engaged in the business of making or selling medical preparations of any kind?

A. I have not.

Q. 8. Have you any technical knowledge of that business? A. None whatever.

Q. 9. Have you any technical knowledge of chemistry in the matter of preparing prescriptions?

A. I have not.

Q. 10. You have never had anything to do with that style of business, have you? A. No.

Q. 11. Do you remember hearing of a preparation or medicine on the market called "Syrup of Figs"?

A. I have seen it advertised.

Q. 12. Have you ever used it? A. Never.

Q. 13. Now, when you saw the name "Syrup of Figs" in connection with that preparation, what did you suppose was the constituents or chief constituents?

(Objected to as incompetent, irrelevant and immaterial.)

A. I supposed it was made of figs in some way.

Q. 14. If you were to see a bottle labeled "syrup of Strawberry," what would you suppose it would contain?

A. I would suppose it was made of strawberries in some way.

Q. 15. If you saw a bottle labeled "Syrup of Raspberry," what would you suppose as to that?

A. I suppose it was made of raspberry.

Q. 16. And would you use the same process of reasoning if you saw a bottle labeled "Syrup of Figs"?

(Objected to as incompetent, irrelevant and immaterial.)

A. I would.

Q. 17. Have you ever heard amongst people or from any source that figs were laxative in their quality?

A. I have.

Q. 18. How long have you known of such an impression as that ?

A. As long as I can remember.

Q. 19. It is quite a popular impression, is it not? It is a general impression? A. Yes, I think so.

Cross-Examination.

(By Mr. OLNEY.)

X. Q. 1. Do you know yourself whether figs are laxative? A. I do not.

X. Q. 2. You have never tried it? A. Never.

X. Q. 3. Did you ever observe the label on the bottle of medicine of this preparation?

A. I never saw a bottle of this medicine.

X. Q. 4. You never saw that it was to be given in medicinal doses, that is a teaspoonful did you?

A. I say I never saw a bottle of the medicine.

X. Q. 5. And never saw what quantities it is to be given in? A. I know nothing about it whatsoever.

X. Q. 6. Would you suppose that if this material, this medicine was to be given in doses of half a tablespoonful, that it would be made from figs? That is, suppose you should see the statement made that this was a medical preparation to be given in doses of half a tablespoonful, would you still suppose that its principal ingredient was figs? A. I would.

Examination in chief of

A. CHESEBROUGH, a witness called on behalf of respondent; sworn.

(By Mr. MILLER.)

Q. 1. State what business you are in, Mr. Chesebrough.

A. I am a member of the firm of William Dimond & Co., shipping and commission merchants.

Q. 2. How long have you been a member of that firm?

A. Since its organization; 1881, I think.

Q. 3. Have you resided in San Francisco all that time?

A. I have been here since 1870 with the exception of eighteen months east.

Q. 4. In San Francisco?

A. Yes, sir; and on the Coast.

Q. 5. And the business of the firm, I understand is shipping, is it? A. Shipping and commission.

Q. 6. Have you ever been engaged in any business connected with the preparation or selling of drugs or medical compounds? A. No, sir.

Q. 7. You have no familiarity with that business, then, have you? A. No.

Q. 8. Have you any technical knowledge of chemistry and the preparation of medical compounds?

A. No, sir.

Q. 9. You never were engaged in that business?

A. No.

Q. 10. Have you ever seen or heard of any preparation on the market here called "Syrup of Figs"?

A. I have seen the posters on the fences and heard—perhaps I have heard persons talk about it.

Q. 11. Now, when you saw that name "Syrup of Figs," advertised in that way, what impression was conveyed on your mind as to the constituents or any of the constituents of the preparation?

(Objected to as incompetent, irrelevant, and immaterial and not pertinent to any issue in this case.)

A. Why, I could only take it as it read, that it was a preparation made from figs, syrup of figs.

Q. 12. That would be the natural supposition, would it not?

(The same objection.)

A. To me it would.

Q. 13. If you were to see a preparation labeled "Syrup of Strawberries," what conclusion would you come to as to the constituents of that preparation?

A. The same thing.

Q. 14. That is, that it was made from what?

A. The strawberry.

Q. 15. And would that same process of reasoning apply to any particular fruit that was so named?

A. It would in my opinion.

Q. 16. Have you ever used this "Syrup of Figs"?

A. No, sir; I have not. I have thought of using it, but I have never used it. I am very fond of figs and, consequently, have thought well of the syrup.

Mr. OLNEY.—I move to strike out the witness's answer as not pertinent to any proposition involved in this case.

Q. 17. (By Mr. MILLER).—Now, what was it, Mr. Chesebrough, that induced you to think of using it?

(Objected to as incompetent, irrelevant and immaterial. What induces a man to think of doing a certain thing cannot be evidence in a case against anybody.)

A. Shall I answer your question?

Q. 18. Yes; just answer it.

A. Because I am passionately fond of figs. There was very seldom a day that I don't have them, don't eat them.

Q. 19. And it was from that fondness of figs that you thought of using this medicine? A. Yes, sir.

Q. 20. Are you aware of the popular impression among people as to the laxative qualities of figs?

A. Well, I may say so far as I myself am concerned, I know it has that effect on me, in that way.

Q. 21. They have proved laxative in your case?

A. Yes, sir.

Q. 22. And you were always under that impression, that they possessed laxative qualities, were you?

A. Yes, sir; aside from the evidence that I gained by eating them.

Cross-Examination.

(By Mr. OLNEY.)

X. Q. 1. Did you notice on these posters, or in the advertisements that the laxative quality of this medicine came from senna? A. No, sir.

X. Q. 2. You never saw that? A. No, sir.

X. Q. 3. Did you ever notice in what sized doses this preparation was to be taken?

A. No, sir. My only impression is seeing it largely advertised.

X. Q. 4. You have never given it any particular attention one way or the other? A. No.

(At this point Clinton E. Worden was recalled as a witness, but, by request of counsel for both parties, the testimony of Richard E. Queen is transcribed into the record preceding that of Clinton E. Worden.)

RICHARD E. QUEEN, recalled for further examination.

(By Mr. MILLER.)

X. Q. 1. Mr. Queen, I hand you a bottle of "Syrup of Figs," and ask you if that contains a preparation put up and sold by your company, the California Syrup of Fig Company?

A. I don't know. It looks like our bottle and label.

X. Q. 2. Has your company put up and sold a preparation in bottles and labels identically like that?

A. I think so. I think we did some years ago use that label and a bottle like this.

R. X. 3. Don't you know that you used it?

A. Yes; I know they used a label like this some years ago.

R. X. 4. And you used a bottle like this, did you not?

A. We did.

R. X. 5. The words, "California Fig Syrup Co.," are blown on the side of the bottle, are they not?

A. On the back of the bottle.

R. X. 6. That is the same style of label of the bottle you were using at the time that you brought suit against the Improved Fig Syrup Company, in this court, was it not? A. Yes, I think it was.

R. X. 7. What year was that suit brought in?

A. To the best of my recollection it was in 1893.

R. X. 8. And when was that suit terminated in the Court?

A. I think it was finally terminated in 1894, if I remember rightly.

R. X. 9. The bottle was taken in the case, was it not?

A. Yes.

R. X. 10. Do you remember when that suit was determined?

A. To the best of my recollection it was in 1894, although it may have been a little later.

R. X. 11. Now, you were using this style of label and bottle which I now hand you at the time of the termination of that case, were you? A. Yes.

R. X. 12. How long after the termination of that case did you use it?

A. I used this label until—well, I think I dropped this label with the end of the year 1894, or early in the year 1885.

Mr. MILLER.—I offer this bottle in evidence and ask that it be marked "Respondent's Exhibit No. 12."

(Marked "Respondent's Exhibit No. 12.")

R. X. 13. Have you one of the boxes or cartons in which these bottles were put up and sold by you at that time? A. I think we have.

R. X. 14. I have requested you some time ago to produce one of them. Have you produced it?

A. I have not, but I will do so before the case is closed, if I can find it.

Mr. OLNEY.—I don't remember that. If you did make such a request it is an oversight.

Mr. MILLER.—I did make the request two or three times and I will make it again.

R. X. 15. I ask you to produce a bottle with a label on it and the carton in which it comes contained as a wrapper, that were used by you or by your firm until after the termination of the case of the California Fig Syrup Company against the Improved Fig Syrup Company, and until you changed to your present form, as illustrated by Exhibit "A," and I also wish you would produce here for evidence the proximate amount of sales of this fig syrup sold by you up to the time that you changed to your present form of label, Exhibit "A." I think I also request you to produce here copies of those advertisements that you had put in the papers, other than those of a medical character, of your preparation, known as "Syrup of Figs." If you have produced any of those it does not appear in the records. Can you produce them? A. I can.

R. X. 16. Then I will request you to produce here at our next sitting the advertisement of your "Syrup of Figs" from the secular press, both before and after you changed to your present form of label, if you can. Can you do it? A. I will.

R. X. 17. I hand you a copy of the Reno Evening Gazette, published at Reno, Nevada, Saturday, November 19, 1898 and call your attention to an advertisement in there under the head of "Miscellaneous," entitled "Syrup of Figs," by the California Fig Syrup Company, and ask you if you recognize that advertisement—if it is the ad-

vertisement of the company and was put in by the order and authority of the company? A. It is.

R. X. 18. Is that a running advertisement for the paper?

A. Yes, that had been running so for some two or three months, I think, or perhaps longer.

R. X. 19. Has the same advertisement been published in other papers by your company? A. Yes.

R. X. 20. Can you mention some other papers in which it has been published?

A. It is difficult to be positive as to the names of papers, because we change advertisements frequently and sometimes run one advertisement in one paper and another advertisement in another. But I can produce other papers containing that advertisement.

R. X. 21. I don't care for new papers. I ask you, then, have you published that advertisement in a great many papers? A. We have.

R. X. 22. You have a very large advertising list, have you? A. We have.

R. X. 23. And have been advertising in different papers, various papers throughout different sections of the country? A. Yes, sir.

R. X. 24. And those advertisements are being published now? A. Yes.

R. X. 25. You are very large advertisers?

A. Yes, sir.

Mr. MILLER.—We offer that advertisement in evidence and ask that it be marked "Respondent's Exhibit No. 13"; and, instead of putting the whole paper in evi-

dence, I would suggest that it be cut out and put on a piece of paper.

(Marked "Respondent's Exhibit No. 13.")

I offer in evidence the printed copy of the transcript of the record in the case of the California Fig Syrup Co. v. Frederick Stearns & Co., in the Circuit Court of the United States for the Eastern District of Michigan on appeal to the Circuit Court of Appeals.

(Objected to as incompetent, irrelevant and immaterial, not evidence and not the best evidence.)

Mr. MILLER.—Well, now this copy is not certified; if you are going to insist on the last objection, I will send on and have it certified.

Mr. OLNEY.—I wish to save you that trouble and expense. I will consider the matter and let you know.

Mr. MILLER.—The volume which I offer is volume 1, of the transcript of the record of the United States Court of Appeals, Sixth Circuit, October Term, 1894, in the case entitled "The California Fig Syrup Company, appellant, vs. Frederick Stearns & Co., appellee," marked "Respondent's Exhibit No. 14A." That is all, Mr. Olney. I don't know of anything else now.

Redirect Examination of

CLINTON E. WORDEN.

(By Mr. MILLER.)

R. Q. 1. Now, Mr. Worden, have you brought your books here, from which you can show the sales by your firm during the years past of the article known as fig

juice, such as is shown in this bottle, marked "Respondent's Exhibit No. 1"? A. Yes, sir.

R. Q. 2. Now, will you please turn to some of those entries and read the whole entry, so that it can be copied into the record, giving the name of the purchaser and the date?

(Objected to as incompetent, irrelevant and immaterial, and, further, on the ground that it is not the best evidence.)

A. This book, called the "Prescription Book," shows exact copies of bills sent to our customers. On August 4, 1888, we sold C. M. Troppman of San Francisco—

R. Q. 3. (By Mr. OLNEY, interrupting).—Are you testifying now from your own knowledge, or are you reading from this book?

A. I am testifying from my own knowledge of the business that we have done.

R. Q. 4. Then you can testify without the use of this book?

A. I cannot, any more than any business man could who has a large number of customers and a large number of items to sell.

Mr. OLNEY.—Very well, now. I object to the witness giving testimony as to what he has done from the book. Introduce the book in evidence, if it is proper evidence at all.

The WITNESS.—These are the official records of Clinton E. Worden & Co. On August 4—

Mr. OLNEY (interrupting).—I object to the witness testifying from the books or refreshing his memory from the entries in the book. And, further, on the ground that

the books themselves are not the best evidence, but, if they were, the entries in the books should be introduced to speak for themselves and not be helped out by the testimony of the witness.

By Mr. MILLER.—I will say for the benefit of the counsel that the book will be left here for his inspection if there is any question as to his incorrectness.

R. Q. 5. Now, Mr. Worden, just proceed to read those entries from this book as they are shown.

A. The bill reads as follows: "6 lbs. of red fire, 1 lb. of yellow fire, 1 doz. chlorate of potash tablets, 1-12 doz. fruit juice, banana; 1-12 doz. fruit juice, prune; 1-12 doz. fruit juice, fig; 1-12 doz. fruit juice, green gage; 1-12 doz. fruit juice, nectarine; 1-12 doz. fruit, pear; 2 lbs compound extract, U. S. P. pills."

R. Q. 6. Did Clinton E. Worden & Co. sell that bill of goods at that time to that person? A. Yes, sir.

R. Q. 7. And that, you say, was as early as August 4, 1888?

A. Yes, sir. They were sold and paid for.

R. Q. 8. Now, show us another entry containing an item of fig juice.

A. A. S. Moss & Co., Chelalis, Washington Territory, 1892, May 23, 1892: "¼ doz. pineapple juice, ¼ doz. raspberry juice, ⅓ doz. strawberry juice, ¼ doz. blackberry juice, ¼ doz. blood orange juice, 1-12 doz. currant juice, 1-6 dozen quince juice, 1-12 doz. nectarine juice, 1-12 doz. grape juice, 1-12 pear juice, 1-12 doz. lemon juice, 1-12 doz. fig juice, 1 lb. soluble essence chocolate, 1 lb. soluble essence coffee."

R. Q. 9. Now, did you sell that bill of goods at that time to that firm?

A. Yes, sir; and the goods were paid for.

R. Q. 10. Now, show us another entry in your books containing records of the sale of fig juice.

A. On May 30, 1893, Smoot Drug Co., Provo, Utah: "½ doz. fruit juice, strawberry; 1½ doz. fruit juice, lemon; ⅓ doz. fruit juice, pineapple; 1-6 doz. fruit juice, fig, 1-6 doz. fruit juice, nectarine; 1-6 doz. fruit juice currant; 1-6 doz. fruit juice, pear; 1 lb. fruit color, red; 1 lb. essence sarsaparilla."

R. Q. 11. Did you sell that bill of goods to that firm at that time?

A. Yes, and the goods have been paid for.

R. Q. 12. Now, produce another item of a similar kind.

A. On August 25, 1894, to Gower, Fowler, Cal.: ¼ doz. fruit juice, blood orange; ¼ doz. fruit juice, pineapple; ¼ doz. fruit juice, strawberry; 1-12 doz. fruit juice, fig." I want to call your attention to something that I have not noticed until now. I have replaced something that had been sold him before—the 1-12 doz. fruit juice pineapple; I will say that you will notice that these fruit juices are ordered in small quantities, with the exception of strawberry, raspberry and pineapple. That is because they deteriorate so rapidly after the packages are opened, and they are only purchased in small quantities.

R. Q. 13. Now, did you sell that bill of goods to that man at that time. [*No answer.*]

R. Q. 14. I noticed on a bill here after the words "Fruit juice, fig," is the words "to replace."

A. Yes, sir.

R. Q. 15. What does that mean?

A. It means to replace a sale that I had sold him before and which had spoiled.

R. Q. 16. Now, will you produce another item of this kind, if you have it?

A. I have nothing more here.

R. Q. 17. Since the date of this last item, 1894, that is to say, during the last four years, has your firm at any time sold these fruit juices? A. Yes, sir.

A. Yes, sir.

R. Q. 18. And have they sold the fig fruit juice?

A. Yes, sir.

R. Q. 19. Which one of these fruit juices is it that has the largest sale?

A. Strawberry, raspberry and pineapple.

R. Q. 20. They are the most popular?

A. They are the most used.

R. Q. 21. The others are more rare, are they, I presume? A. Yes, sir.

R. Q. 22. Now, a package has been offered in evidence marked complainant's exhibit "V," entitled "California Fig Syrup," and on the package is the statement "That it was prepared by the Yetiva Drug Company of Louisville, Kentucky." Now, I understand that the firm of Clinton E. Worden & Co. put up that preparation, did they? A. Yes, sir.

R. Q. 23. For whom did they put it up?

A. For Mr. E. Little.

R. Q. 24. Did you receive an order from E. Little?

A. Yes.

R. Q. 25. Just state what the facts were between your firm and E. Little regarding this matter, from beginning to end.

A. The order was placed with us through a representative named Mitchell.

R. Q. 26. (By Mr. OLNEY.)—A representative of whom?

A. A representative by the name of Mitchell. I can't give his initials now.

R. Q. 27. Whom did he represent?

A. He represented Clinton E. Worden & Co.

R. Q. 28. That is what I wanted to get at.

A. The order was placed in the laboratory and was filled and delivered, but not until some time after did the nature of the order become known to the principal.

R. Q. 29. (By Mr. MILLER.)—Now, what is this piece of pink paper, which I hand you, with some little pencil marks on it?

A. This is a rough sketch of the style of wrapper which Little desired us to get up for him.

R. Q. 30. Did that accompany the order for the stuff?

A. Yes; it accompanied the order for the stuff.

R. Q. 31. Where is the order?

A. This is the original order. (Producing.)

R. Q. 32. The one which you now produce?

A. Yes, sir; the original agent's order.

R. Q. 33. That is, this order turned in to your firm by the agent Mitchell, and this is the original order, is it?

A. The order as turned into the office.

(By Mr. MILLER.)—We offer this original order in evidence and ask that it be marked "Exhibit No. 7."

(Marked "Respondent's Exhibit No. 7.)

R. Q. 34. On this order I find the words "Send proof of label before running." Now, what label does that refer to?

A. It refers to the label that we got up from the instructions given.

R. Q. 35. Did you get up a label according to the instructions and according to the sample as shown on this pink paper which is to be offered in evidence?

A. Yes, sir.

(By Mr. MILLER.)—We offer this piece of pink paper containing the proposed label in evidence and ask that it be marked "Respondent's Exhbit No. 8."

(Marked "Respondent's Exhibit No. 8.)

R. Q. 36. Now, where is the label that you got up for Little in accordance with these instructions?

A. There is the wrapper, there is the label. (Showing.)

R. Q. 37. First you produce a wrapper similar in all respects to the wrapper contained in "Complainant's Exhibit V." A. Yes, sir.

(By Mr. MILLER.)—We offer that in evidence and ask that it be marked Exhibit No. 9.

(Marked "Respondent's Exhibit No. 9.")

R. Q. 38. Now, the small label which you produce here is what? A. The label that goes in the bottle.

(By Mr. MILLER.)—I offer that in evidence and ask that it be marked Respondent's Exhibit No. 10.

(Marked Respondent's Exhibit No. 10.)

R. Q. 39. Now, what is this paper that I hand you?

A. This is the laboratory and working order sheet. The original order sheets, whether coming from agents or through the mail, never go into the laboratory.

R. Q. 40. You mean the laboratory for this particular batch of stuff? A. Yes, sir.

Mr. MILLER.—We offer this in evidence and ask that it be marked "Exhibit No. 11."

(Marked "Respondent's Exhibit No. 11.")

R. Q. 41. Now, how much of that stuff was prepared under that order, Mr. Worden? A. One gross.

R. Q. 42. Is that all? A. That is all.

R. Q. 43. What was done with it?

A. It was delivered to Mr. Little.

R. Q. 44. How much did you receive for it?

A. Sixteen dollars.

R. Q. 45. You never sold any of it to any other person, then? A. No, sir.

R. Q. 46. And as I understand you to say it was prepared according to the order given you by Little?

A. Yes, sir.

R. Q. 47. And under his direction?

A. Yes, sir.

R. Q. 48. Now, I understood you to say a moment ago that none of the members of the firm knew individually about the details of this order until after it was all finished? A. No, sir.

R. Q. 49. Is that correct?

A. That is correct; yes, sir.

R. Q. 50. Now, after the discovery that some stuff had been sent out of your place with a label on it containing the words "California Fig Syrup," what did you do?

A. I reproved the bill clerk and order clerk severely for permitting any preparation with that title to be put up in our laboratory, as it was contrary to my instructions, and took every possible known means to prevent any more of it being so put up.

Mr. OLNEY.—I move to strike out the witness's answer on the ground that it is incompetent, irrelevant and immaterial and has no bearing upon this case.

R. Q. 51. (By Mr. MILLER.)—Now, what title do you refer to? "California Fig Syrup?" A. Yes, sir.

R. Q. 52. You claimed the right to make fig syrup, I understand, did you? A. Yes, sir.

R. Q. 53. But you did not desire to use the name "California Fig Syrup?" A. No, sir.

R. Q. 54. Those are the facts in regard to the matter, are they? A. Yes, sir.

R. Q. 55. Mr. Worden, will you produce a copy of that newspaper called the "New Era," which you received containing a notice of the decision of the case of the California Fig Syrup Company vs. Frederick Stearns & Co., by virtue of which you testified you considered you had the right to use the name "Syrup of Figs?"

A. Yes, sir.

R. Q. 56. You have it with you now, have you?

A. I have not.

R. Q. 57. Will you produce it after the recess?

A. Yes, sir.

Recross Examination.

(By Mr. OLNEY.)

R. X. Q. 1. Do the books which you have produced in Court show all of the goods you have sold since 1888?

A. No, sir.

R. X. Q. 2. Do these books show all of the fig juice that you have sold during that time? A. No, sir.

R. X. Q. 3. Have you made a search for any further entries in your books? A. I have not.

R. X. Q. 4. Will you produce here at the next session or as soon as you can all of the entries of fig juice that you have sold?

A. It is impossible. I cannot. It would take possibly a month to go over the bills that we have, but I will be pleased to offer to you some, and if you wish I will do so.

R. X. Q. 5. Have you any index of these record books that you have introduced in evidence? Do they contain an index showing to whom the goods were sold?

A. The items?

R. X. Q. 6. No, the persons.

A. I don't know as I exactly understand you.

R. X. Q. 7. Do those books that you have produced here contain an index showing to whom you sold the goods? A. Yes, sir.

R. X. Q. 8. Now, how did you find these particular items in these books?

A. By taking the sales book and beginning at the first page and going down through.

R. X. Q. 9. Now, how many of these books have you?

A. I should judge one hundred or two hundred.

R. X. Q. 10. Will you state the page now upon which you have read the entries in each one of those books? Commencing with 1888?

A. That page is 337.

R. X. Q. 11. What is the date of the first entry in that book? A. May 2, 1888.

R. X. Q. 12. What is the date of the last entry?

A. September 29, 1888.

R. X. Q. 13. Now, will you take the next book?

A. Similar information?

R. X. Q. 14. Yes.

A. May 2, 1892. Let me explain. There are books intervening between these.

R. X. Q. 15. Now, will you give the page of the entry?

A. One hundred and twenty.

R. X. Q. 16. What is the last entry in the book?

A. June 30.

R. X. Q. 16. What year? A. The same year.

R. X. Q. 17. Now, take the next book. Give the date of the first entry, the page of the entry that you read in evidence, and the date of the last entry?

A. May, 1893; June 30, 1893.

R. X. Q. 18. You did not give the page, did you, the page of the entry?

A. The page of the entry, 22.

R. X. Q. 19. Take the next one.

A. July 2, 1894, entry on page 372. The last entry is August 31 of the same year.

R. X. Q. 20. Now, the next one.

A. That is all.

R. X. Q. 21. Who found these entries in these books for you?

A. I had them looked up by a clerk. After they were found, I looked them over myself.

R. X. Q. 22. What was the name of the clerk?

A. I can't tell you.

R. X. Q. 23. Did you give instructions to any particular clerk?

A. I did not. I gave general instructions to the office.

R. X. Q. 24. To whom did you give those instructions?

A. To my brother, W. W. Worden.

R. X. Q. 25. What were the instructions that you gave him?

A. To look up sales on fig juice, a few sales in different years.

R. X. Q. 26. Now, don't you know what clerk it was that did the work? A. I do not.

R. X. Q. 27. Can you find out? A. I can.

R. X. Q. 28. Will you produce him here without our subpoenaing him?

A. I will, with pleasure.

R. X. Q. 29. I give you notice, then, to bring that clerk here. This order from Little & Co., I understand, was delivered to the house by an agent of yourself, named Mitchell? A. Yes, sir.

R. X. Q. 30. You didn't know anything about it until after the order was filed? A. I did not.

R. X. Q. 31. So your testimony, then, is simply as to what you know from the order itself?

A. What I know from the order itself.

R. X. Q. 32. You know no other circumstance in connection with it of your own knowledge?

A. Except that the goods were delivered.

R. X. Q. 33. Do you remember that the goods were delivered?

A. I don't remember when they were delivered, but I know that they have been paid for.

R. X. Q. 34. Where is Mr. Mitchell?

A. I don't know. I don't think he is in this part of the country.

R. X. Q. 35. When was it that you reproved the men in your employ for having filled that order?

A. I think about the time of the beginning of this suit.

R. X. Q. 36. In whose handwriting is the script on exhibit No. 7? A. In Mr. Mitchell's.

R. X. Q. 44. In whose handwriting is the script on exhibit No. 8. A. I don't know.

R. X. Q. 38. Where was the printing done on Exhibit No. 9? A. In our own printing office.

(At the hour of 12:30 P. M. a recess was had until 2 P. M., when the following proceedings were taken:)

Mr. ROWE.—It is admitted that Miss Lillie Burns, an employé in the laboratory of Clinton E. Worden & Co., was instructed to examine the records containing copies of bills of said company between the year 1888 and the middle of 1897, and that she found the bills which were introduced into the record as evidence at the morning session, showing a number of orders filled for fig juice and

other fruit juices. Is that correct, Mr. Olney? Is that sufficient.

Mr. OLNEY.—Yes. And that she examined about fifty books and found no other bills.

Mr. ROWE.—No other bills during that time. That she examined about fifty books and found no other bills during that period?

Examination of

CLINTON E. WORDEN (recalled).

The WITNESS.—You asked me this morning if there were any other bills. There are other bills for goods sold since the middle of 1897.

Mr. ROWE.—They have not been introduced in evidence.

Examination in chief of

WILLIAM PINNIGER, a witness called on behalf of complainant; sworn.

(By The EXAMINER.)

Q. 1. What is your full name?

A. William Pinniger.

Q. 2. What is your age, residence and occupation?

A. I am about fifty-three. My residence is Reno, Nevada.

Q. 3. What is your occupation?

A. By occupation, I am a pharmacist.

Q. 4. (By Mr. OLNEY.)—Did you ever study in any institution the business of pharmacy?

A. Yes, sir; somewhat.

Q. 5. Are you a graduate of any school of pharmacy?

A. The Pharmaceutical Society of Great Britian.

Q. 6. How long have you been in the business?

A. About forty years.

Q. 7. Where?

A. In various parts of England, New York and in Nevada.

Q. 8. When did you first go into business in Nevada?

A. On my own account, do I understand you?

Q. 9. Yes, sir.

A. I think it must be about 1877.

Q. 10. Have you been in business there ever since?

A. Nearly ever since, except a short period I was away, in London.

Q. 11. Are you acquainted with Mr. Queen?

A. I know him very well.

Q. 12. When did you become acquainted with him?

A. Probably about 1877, I think.

Q. 13. He was in business in Reno at that time, was he? A. Yes, sir.

Q. 14. Were you both in the same business?

A. Yes, sir; we were in partnership subsequently.

Q. 15. You were in partnership? Do you remember about the time that he first prepared a medicine which is known as "Fig Syrup" or "Syrup of Figs?"

A. Quite well.

Q. 16. Did you have anything to do with the manufacture of that medicine at any time afterward?

A. Yes, sir.

Q. 17. What time was it?

A. About 1879, I think this must have been.

Q. 18. Did you at any time manufacture the medicine yourself? A. I did.

Q. 19. When did you commence to do that?

A. As near as I can recollect it must have been in April—April or May, 1879.

Q. 20. Is there anything to fix the date in your memory?

A. Yes, Mr. Queen and myself were in business in separate stores prior to that time. We were both burned out in the great conflagration there in the early part of March of that year, and later on in the month we joined issues and opened a store together.

Q. 21. Well, now, is there anything in connection with that fire that causes you to remember about the manufacturing of this medicine? A. Quite well.

Q. 22. What was it?

A. Well, Mr. Queen lived in part of the town that was somewhat distant from the point of outbreak, and his friends managed to get him out of the flames, and to save a portion of his stock, which was not my case. Everything that I had was consumed. I hadn't a thread to my back. Well, among the articles saved was a percolator, a large percolator, containing a compound, which, of course, until I became initiated I didn't understand what it was, but which I subsequently found was a portion of the ingredients of "Syrup of Figs." And after we had gotten somewhat settled and had relieved the sufferings of those who were burned, etc., and could give some little attention to it, then we turned our attention to making this, which I subsequently learned was the first large

batch of "Syrup of Figs" that had been made. I think that Mr. Queen informed me that several experimental quantities had been prepared, but this was the first quantity of any importance that had been turned out.

Q. 23. Did you make any arrangements with him after that in regard to the manufacture of this article?

(By Mr. MILLER.)—The question is objected to as incompetent, irrelevant and immaterial because it occurred before the incorporation of the California Fig Syrup Company and was an arrangement with Mr. Queen individually, which is not at issue in this case.

A. Well, I proceeded to manufacture the syrup of figs from that time on.

Q. 24. (By Mr. OLNEY.)—Who was the party then from that time on that actually superintended the manufacture of the "Syrup of Figs"?

(The same objection.)

A. I was.

Q. 25. (By Mr. ROWE.)—What time was that? Was that in April, 1879?

A. Yes, sir; approximately, but at this time, I can't recollect the exact date.

Q. 30. (By Mr. OLNEY.)—You remember the fire?

A. Yes, sir.

Q. 31. When was that?

A. I think it was in March.

Q. 32. This was soon after the fire?

A. This was soon after the fire.

Q. 33. How long did you continue to manufacture?

A. I think to about the end of 1880.

Q. 34. Now, during that time, do you remember whether or not figs were uniformly used in the preparation, and if so, as to what quantities?

Mr. MILLER.—We object to that as incompetent, irrelevant and immaterial on the ground that it relates to medicine that was made before the California Fig Syrup Company was incorporated, and something with which we have nothing to do in this suit.

A. Yes, figs were used at that time by him.

Q. 35. To what extent? Do you remember?

(The same objection.)

A. The quantities I can't recollect at this date, but I know a quantity of figs were used on each occasion that I made the preparation.

Q. 36. On each occasion? A. Yes.

Q. 37. Did you ever make any of this medicine without using a certain proportion of figs?

(The same objection.)

A. No, sir.

Q. 38. Did you leave Reno at any time to go to London?

A. Yes, sir; at the end of December, I think it was, in 1880, I left Reno.

Q. 39. Then you manufactured up to the time you left Reno for England? A. Yes, sir.

Q. 40. Were you ever at any time interested in the California Fig Syrup Company? A. Yes sir.

Q. 42. What share of stock did you have in it?

A. I first bought—before the incorporation of the company I owned a one-fifth interest. Subsequent thereto I had twenty thousand shares.

Q. 43. There were one hundred thousand shares, were there?

A. There were one hundred thousand shares. Yes, sir.

Q. 44. Have you any interest in that company now?

A. No, sir.

Q. 45. Have you had any interest for several years past? A. No, not since 1882 or 1883.

Cross-Examination.

(By Mr. MILLER.)

X. Q. 1. What became of your stock in the California Fig Syrup Company? A. It was sold to Mr. Queen.

X. Q. 2. Who sold it?

A. A friend of mine by the name of Bole, since deceased.

X. Q. 3. I thought the stock belonged to you?

A. Yes, sir. But you understand I was in London at that time. There was one of those unfortunate disagreements that creep up in companies, crept on this occasion, and while it was proposed by one faction to take my stock entirely by assessing it beyond what I was able to pay, another wanted to purchase it. And eventually, not being on the spot, I sent a power of attorney to Mr. Bole, telling him to act in the matter for me according to his own judgment. He elected to sell, and sold, for a small sum of money, to Mr. Queen.

X. Q. 4. How much did he sell for?

(Objected to as incompetent, irrelevant and immaterial.)

A. I can't recollect at this time.

X. Q. 5. About two hundred dollars or three hundred dollars?

A. Some small amount of money. I don't remember what it was.

X. Q. 6. An insignificant sum, was it?

A. A small sum of money.

X. Q. 7. It was under five hundred dollars, was it?

A. I think it was; yes, sir.

X. Q. 8. When you were manufacturing the medicine for Mr. Queen, what else did you put in it besides figs?

Mr. OLNEY.—I instruct you not to answer the question, Mr. Pinniger.

A. I think I must ask the protection of the Court in the matter.

Mr. OLNEY.—We object to the question as incompetent, irrelevant and immaterial. It is immaterial what was at that time a secret. The formula has been changed. It simply opens the door to proof of the new formula.

Mr. MILLER.—Well, it is impossible for me to go ahead with the examination until the witness answers that question. I can't proceed any further. The matter was brought on direct examination as to the manufacture of this medicine at that time, and one of these ingredients was stated. I am entitled to a thorough cross-examination, and I purpose to have it, and I cannot go any further until the witness answers the question.

Mr. OLNEY.—I make the further objection that it is not cross-examination.

The EXAMINER.—Gentlemen, all I can do is to certify the matter to the Court, if you request it.

Mr. MILLER.—I request that it be certified to the Court. We might as well have it out now as at any other time.

The EXAMINER.—Does the record show that the witness refuses to answer the questions?

The STENOGRAPHER.—It does not.

X. Q. 9. (By Mr. MILLER.)—Do you decline to answer the question, Mr. Pinniger?

A. I think it would not be quite right to do so.

X. Q. 10. Well, do you decline to do it? I don't care whether you think it is right or not. I simply want to get your decision.

Mr. MILLER.—Let me make a suggestion.

X. Q. 11. Have you any reason for declining except my instruction to you?

A. Simply that I think I ought not to expose my friend's formula; simply that.

X. Q. 12. Mr. MILLER.—Then I understand that you do decline to answer the question?

A. Well, I must decline to answer the question.

The EXAMINER.—Do you ask that it be certified to the Court?

Mr. MILLER.—I ask that it be certified to the Court.

The EXAMINER.—Do you wish it to be certified immediately, or wish it to be postponed?

Mr. MILLER.—You can do it at any time.

(Note by stenographer.—Pending the submission of this question to the Court, the taking of testimony was proceeded with as follows:)

Examination in chief of

C. J. BROOKINS, a witness called on behalf of complainant; sworn.

(By The EXAMINER.)

Q. 1. State your full name? A. C. J. Brookins.

Q. 2. What is your age, residence and occupation?

A. I am a merchant in Reno. I sell fruit, candy, cigars, books, stationery, pianos, organs; a general variety store.

Q. 3. (By Mr. OLNEY.)—How long have you been in business in Reno? In general merchandising?

A. About twenty-six or twenty-seven years.

Q. 4. Do you know Mr. Queen? A. Yes, sir.

Q. 5. Do you know the California Fig Syrup Company?

A. Yes, sir.

Q. 6. Do you remember about the time it was organized? A. Yes, sir.

Q. 7. Do you remember about its being organized?

A. Yes, sir.

Q. 8. Is it a part of your business to sell fruit to customers? A. Yes, sir.

Q. 9. Well, are you in the habit of selling figs?

A. Yes, sir.

Q. 10. Were you in the habit of selling figs to Mr. Queen, or to the California Fig Syrup Co?

A. Yes, sir.

Q. 11. Was there anything that called your special attention to the fact that they were buying the figs from you?

A. Yes, sir: they bought larger quantities than other people did. That was one thing. They used to buy a dollar's worth or more at a time. While other people usually bought ten cents' worth or two bits' worth at most.

Q. 12. Did that lead you to make inquiries?

A. Yes, sir.

Q. 13. What did you ask?

A. I asked what they done with so many figs. They said—

Mr. MILLER (interrupting).—We object to what he asked other people, and we object to what the other people told him, on the ground that it is incompetent, irrelevant and immaterial, and purely hearsay.

Q. 14. (By Mr. OLNEY.)—Well, what reply was made?

Mr. MILLER.—We make the further objection on the ground that it is not stated to whom this question was asked, or who made the reply.

Q. 15. (By Mr. OLNEY.)—What reply was made?

A. They said that they were manufacturing the medicine called the "Syrup of Figs."

Q. 16. Did they tell you what kind of medicine it was?

(The same objection, and on the further ground that it is purely hearsay.)

A. They said it was a laxative.

Q. 17. Now, who was it you had this conversation with?

A. Well, I think it was Mr. Queen, and some other employés. This conversation was with Mr. Queen. He moved up just a few doors from me after the fire, and he used to come in down there and to buy these figs, and I

wanted to know what he done with so many of them, and he told me that he was manufacturing this medicine.

Mr. MILLER.—I make the further objection, since it has been found out that it was Mr. Queen who made these alleged statements of facts, and I move to strike out all the answer that has been given regarding what was said by Mr. Queen or anybody on his behalf, on the ground that he is a party in interest in this litigation, and his statements therefore are incompetent, irrelevant, and immaterial.

Q. 18. (By Mr. OLNEY.)—Do you remember Mr. Alt? So you know Mr. Alt?

A. Yes, I know him well.

Q. 19. Do you remember his manufacturing the medicine up at Glendale? A. Yes, sir.

Q. 20. Did you sell any figs to the company at that time?

A. Well, I really could not say as to that, I only know that a wagon drove up one day and got a large lot of figs, and I asked them also what they were going to do with it.

Mr. MILLER.—We object to anything that he asked of the wagon, as to what they were going to do with it, as the witness was proceeding to say, on the ground that it is incompetent, irrelevant, and immaterial.

Q. 21. (By Mr. OLNEY.)—To whom were you informed that these figs were to be delivered, if anybody?

Mr. MILLER.—We make the same objection, and also object on the ground that it is purely immaterial as to what he was informed.

A. The Syrup of Figs Company.

Q. 22. Do you know where the wagon came from?

A. I am quite sure it came from Glendale.

Mr. MILLER.—I move to strike out the answer on the ground that it is perfectly palpable that the witness is guessing at it, and that he has no knowledge of his own in the matter.

A. The knowledge I had was that the man who was driving the wagon I knew lived at Glendale. I knew he lived in Glendale.

Q. 23. (By Mr. OLNEY.)—Do you know whether or not he got supplies in Reno for Mr. Alt or the California Fig Syrup Co.? A. I only know what he said.

Q. 24. You only know what he said?

A. That is all.

Q. 25. Now, can you fix the time?

Mr. MILLER.—The time of what?

A. The only way I can fix it, I know it was after the fire in 1879. The whole town burned up. It was after March—either the later part of March or later.

Q. 26. (By Mr. OLNEY.)—Do you also remember the fact that Mr. Alt was manufacturing the medicine up at Glendale?

A. Yes, sir; I made inquiries, and found out that he was manufacturing at Glendale.

Mr. MILLER.—I move to strike out the answer on the ground that it is purely hearsay as to what he found out.

Mr. OLNEY.—You can take the witness.

Cross-Examination.

(By Mr. MILLER.)

X. Q. 1. When did you first hear of the name "Syrup of Figs?"

A. About 1879, or before that. Somewheres along there, I could not remember positively. Somewheres along there.

X. Q. 2. The name was known up in that country, was it? A. Yes, sir.

X. Q. 3. What did you suppose were the constitutents of the medicine, if anything, from hearing the name "Syrup of Figs?"

A. Well, I suppose that it was—I asked what it was. In fact, I bought some of the goods. I asked if it was made of pure fig juice or figs, and they said no; that it was a laxative, and I said "Is it good for me? I am constipated." They said it was just the thing. And I said "Is there anything in it that will gripe a person?" They showed me a bottle of it and I said, "I can't see any figs in this." And they said it was only the juice of the figs, and they said it was good for me, that there was nothing in it that would harm me; and I paid for it and took it.

X. Q. 4. When you heard the name "Syrup of Figs," what impression did that carry to your mind?

A. Well, it carried the impression that there must be figs in it, and then knowing that they bought figs of me, of course I thought there must be figs in it. I knew that it was not pure figs, because I was selling the figs myself and eating them myself, and if it was nothing but figs,

I could eat my own figs, I would not have to buy them.

X. Q. 5. You have often heard of the impression that figs are a laxative, have you not?

A. Well, to a certain extent; yes, sir. I have been told that figs were laxative to a certain extent, that is, the seeds of figs were; that they irritate the bowels more or less, and cause the bowels to empty. But I never thought there was any more of a laxative in them than in the apple or anything like that. If a person should eat a great many of them, they might be a laxative. I used to eat them. I am very fond of them.

X. Q. 6. Now, what year was it that you sold these figs to these people?

A. It was in 1879 or 1880; along there.

X. Q. 7. Was it in the same year as the fire?

A. It must have been in 1879. Yes, in the last of 1879. I am sure of that.

X. Q. 8. The fire, I understand, was about March, 1879? A. Yes.

X. Q. 9. It was after the fire, wasn't it?

A. After the fire. I remember it positively for this reason, that they moved up the second door to me, and being neighbors, we were anxious to have a little patronage, of course, and I noticed all the customers that came in and was anxious to get started again, having lost everything in the fire and naturally talked a little more than I generally do to people that buy of us under those circumstances.

X. Q. 10. And they were manufacturing the medicine then in Reno, just near your place, were they?

A. Well, I never went in to see them manufacture.

They told me—Mr. Queen told me he was manufacturing. I never went in the house to see it.

X. Q. 11. Well, you understood they were manufacturing at that time?

A. Yes, sir; I understood they were manufacturing to a small extent.

X. Q. 12. Up to what time did you sell him these figs?

A. Well, I can't tell you how long I sold them.

X. Q. 13. Well, about how long?

A. Oh, it must have been various times. I remember that.

X. Q. 14. Did you sell them to him during a year.

A. I think so.

X. Q. 15. How often did you sell them to him?

A. Possibly once a week, possibly twice. I could not remember that far back.

X. Q. 16. In what quantities did you sell them to him?

A. Well, usually they got a dollar's worth at a time.

X. Q. 17. Mr. Queen would come in and get them, would he? A. Yes, sir.

X. Q. 18. In what form were the figs?

A. We called them the California dried figs, the black fig.

X. Q. 19. The California black dried figs?

A. Yes, sir.

X. Q. 20. And he would come in and buy a dollar's worth, and you sold them to him?

A. Yes, sir.

X. Q. 21. And he would take them away with him?

A. Yes, sir; he always paid the money and took them with him; just the second door.

X. Q. 22. And all you know as to what he was going to do with them was what he told you?

A. Certainly, that is all. I didn't go in to see him make it.

X. Q. 23. Now, did you ever sell the fig to anybody else, except Mr. Queen?

A. Oh, yes, sir.

X. Q. 24. What other persons?

A. Well, I could not tell you. But lots of people bought ten cents' worth or five cents' worth.

X. Q. 25. No, I mean for the manufacture of this medicine.

A. Oh, well, I think I sold Mr. Pinniger figs once or twice.

X. Q. 26. Well, Mr. Pinniger and Mr. Queen were manufacturing the medicine together.

A. Oh, yes, sir; yes, sir.

X. Q. 27. Now, besides those two, did you sell any other person figs for that medicine?

A. Well, I am sure of those figs that I was telling you of that were bought by the man in the wagon. I am sure they were for that company.

X. Q. 28. Now, what year was that?

A. That was, I think, about 1880; 1879 or 1880, somewheres along there. It was after the fire, I know. That is all I can tell you.

X. Q. 29. You don't know how long after the fire?

A. I do not; no, sir.

X. Q. 30. And you sold those to the party in the wagon?

A. Yes, he said they were for a certain purpose.

X. Q. 31. Were those the last figs you sold to the company or to any body connected with the company?

A. Well, I don't think so.

X. Q. 32. Were they the last you sold?

A. I could not tell you.

X. Q. 33. Do you sell them any now?

A. Yes, sir; I have got them in stock to-day.

X. Q. 34. I mean do you sell any of those figs to the California Fig Syrup now?

A. Oh, not now. Their factory is not there any more.

X. Q. 35. When was the last you sold to them?

A. I could not tell you, sir.

X. Q. 36. Now, you don't remember the year when you sold those figs to the boy in the wagon, do you?

A. I believe it was after the fire.

X. Q. 37. The fire was in March, 1879; was it during that year?

A. Well, I think it was in the latter part of that year. I would not swear positively about that.

X. Q. 38. You remember that sale by reference to the fire, do you not? A. Yes, sir.

X. Q. 39. And you remember that it was after the fire?

A. Yes, that is my recollection.

X. Q. 40. Now, could it have been as much as a year after the fire, do you suppose?

A. I could not tell you.

X. Q. 41. What is your best judgment about it as near as you can get at it?

A. I think it was—I don't think it was a year, that is my judgment. It was less than a year.

X. Q. 42. You think it was less than a year?

A. Yes, sir; I do.

X. Q. 43. That is the last sale you have any definite recollection of for the use of figs in this medicine, is it?

A. Well, yes, I think that is the last one I remember; and I don't think I would have remembered that, for I don't pay any attention to anything I sell. People who buy, of course, pay for it, and I don't pay much attention to it. But I remember this on account of the fire more particularly in asking what they were for and what they were buying so many for, because they don't usually buy them that way.

X. Q. 44. How did you put those figs up that you sold to him? A. In a sack.

X. Q. 45. In a gunny-sack?

A. In a gunny-sack.

X. Q. 46. And he took the gunny-sack with the figs away? A. Yes, sir.

Redirect Examination.

(By Mr. OLNEY.)

R. Q. 1. Do you remember whether or not the California Fig Syrup Co. bought figs of you as long as it manufactured the medicine at Reno?

A. I am sure they did; I feel positive that they did; yes, sir.

R. Q. 2. Now, you are uncertain about the dates, as I understand you, that you sold these figs when it was being manufactured at Glendale. You are uncertain about the particular date?

A. How is it that I am uncertain about it?

R. Q. 3. I understand that you are uncertain about the date?

A. Yes, the particular date; I have never given it any thought.

R. Q. 4. Now, if it should turn out that Mr. Alt was manufacturing at Glendale some three years after the fire—

A. (Interrupting.)—Yes, I think it was as long ago as that, because I drove down there and was anxious to see the great "Syrup of Figs" factory, and talked about it, and went to see it.

R. Q. 5. You saw it there at Glendale?

A. Yes, sir; and I had quite an interest in it as I was doing business there and was talking some of buying stock, but I had no ready cash; I lost every nickel in the fire. Everything, I supposed, was insured, but it was not. The agent told me he had simply neglected to insure me and left me dead-broke.

R. Q. 6. But you do remember the fact that they were manufactured at Glendale and you went there?

(Objected to as leading.)

A. Yes.

Recross Examination.

(By Mr. MILLER.)

R. X. Q. 1. When you say you sold figs to the California Fig Syrup Co., do you mean to Mr. Queen and his people?

A. Yes, I mean his people, I mean the people that were working in the store at the time.

R. X. Q. Working in Mr. Queen's store?

A. Yes, sir.

R. X. Q. 3. Where was his store at that time?

A. It was the second door below me.

R. X. Q. 4. Was it a drugstore? A. Yes, sir.

R. X. Q. 5. And that is what you mean by your statement of having sold to the California Fig Syrup Co., was it not? A. Yes, sir.

R. X. Q. 6. Mr. Queen was supposed to be the manager of that store, wasn't he? A. Yes, sir.

Examination of

CLINTON E. WORDEN (recalled).

(By Mr. MILLER.)

Q. 1. Mr. Worden, I hand you this paper or periodical entitled the "Pharmaceutical Era" of April 23, 1896, and call your attention to an article on page 530, entitled "Syrup of Figs Decision," and will ask you if this periodical is the one that contains the notice you referred to in your testimony heretofore when you said you did not commence to manufacture this syrup of figs under that name after you had seen this notice and this decision, and that you then considered that you had a right to manufacture it? A. Yes sir; it is the publication.

Q. 2. Are you a subscriber to this journal?

A. We are.

Q. 3. How often does it issue?

A. Once a month.

Q. 4. And is this the regular monthly issue for that month? A. Yes, sir.

Q. 5. What is the date? A. April 23, 1896.

Q. 6. Did you receive it during the month of April, 1896, or the early part of May? Either of them?

A. Yes, sir.

Q. 7. When you say that you read that decision in there, did you? A. Yes, sir.

Q. 8. Or the notice of the decision, did you?

A. Yes, sir.

Q. 9. What is the character of this journal?

A. It is a pharmaceutical journal of very great prominence throughout the country.

Q. 10. What is, in general, the class of subscribers to that journal?

A. The pharmacists who wish to keep in touch with matters—improvements in pharmacy and chemists—as well.

Q. 11. Does it circulate all over the United States?

A. It circulates all over the United States.

Q. 13. Where is it published?

A. New York City now; at that time I believe in Detroit.

Mr. MILLER.—We offer that in evidence.

(Marked "Complainant's Exhibit No. 15.")

Mr. OLNEY.—I will say here that it will be impossible to keep Mr. Pinninger there until next Wednesday, and if the Court should rule that this question must be answered I suppose that he will not be here for cross-examination, and I will have to allow the direct testimony to go out. But I want to give notice to the other side now that if they want to cross-examine him upon

any other matters, to do it at the present time, because he will not be here on Wednesday.

Examination of

WILLIAM PINNIGER, recalled for further cross-examination.

Mr. OLNEY.—We will withdraw our instructions to the witness Pinniger not to answer, and will make our objection to the question as incompetent, irrelevant, and immaterial, and not proper cross-examination.

X. Q. 13. (By Mr. MILLER.)—Will you now state what were the other ingredients of this syrup of figs as manufactured by you?

A. As near as I can remember them. Figs, senna, aromatics, sugar—I can't recollect them all, possibly.

X. Q. 14. Do you know what aromatics were used?

(Objected to as incompetent, irrelevant, and not proper cross-examination.)

A. I can't positively swear to the aromatics at this date.

X. Q. 15. You had a formula, did you not?

A. Yes, sir.

X. Q. 16. And you manufactured it according to your formula? A. Yes, sir.

X. Q. 17. Have you got that formula now?

A. No, that became the property of the company, you know. I did not preserve a copy myself. I am speaking from memory.

X. Q. 18. Do you remember now what the formula was?

A. No, I could not give you the proportions.

X. Q. 19. I will hand you a formula marked "Respondent's Exhibit No. 5," and ask you to read it over and see if that was not the formula according to which you manufactured the medicine?

(Objected to as not proper cross-examination, as incompetent, irrelevant, and immaterial.)

A. No, that is not the formula.

X. Q. 20. Do you remember what proportions of figs you put in the medicine?

A. Well, I could not possibly recollect it at this date, sir. You see, it is twenty years ago.

X. Q. 21. Well, if you can't remember, you can't. I am simply asking you if you can?

A. I can't recollect the quantity.

X. Q. 22. Can you remember the form in which you put them in the medicine?

A. Yes, I remember that distinctly.

X. Q. 23. How was that?

A. They were first of all cleansed and cut up and then digested with hot water.

X. Q. 24. What else was done to them?

A. They were pressed and then the sugar was added to the compound.

X. Q. 25. After going through the press that brought out a kind of juice, did it?

A. It brought out some of the extractable matter.

X. Q. 26. A kind of a thick or viscid syrup, was it?

A. Yes, sir.

X. Q. 27. That came from the fruit being dissolved by the hot water? A. Yes, sir.

X. Q. 28. And run through the press?

A. And run through the press, yes, sir.

X. Q. 29. Then you added sugar to it, did you?

A. Yes, sir; then I added sugar.

X. Q. 30. So that was practically fig juice you got after that extraction?

A. No, the fig extract, the extract of the figs. It was really a modification of the pharmaceutical process in making confection of senna, which has a world-wide reputation. All pharmacists know how it is prepared. And this was just simply a modification of that same thing as to the treatment of the prunes, figs, and tamarind used in that compound.

X. Q. 31. Now, after you got this extract of fig you then added sugar to it, I understand? A. Yes, sir.

X. Q. 32. That was put into the medicine?

A. Yes, sir; or rather the other portions were added to that, I think.

X. Q. 33. Now, how much of this fig extract did you put in the medicine? What proportion?

A. Well, really, my memory does not serve me on this case after twenty years, you know.

X. Q. 34. Did you have any definite proportion to put in.

A. Yes, sir; there was a regular formula at the time, but I have not got the formula. I have not seen the formula since that time, and I cannot state positively under oath what the quantities were.

X. Q. 35. You would not remember the formula now if you were to see it, would you?

A. I might recollect it if I was to see it, but the one you produce here is not the one I had then.

X. Q. 36. You don't recollect it now?

A. I don't recollect the proportions. I don't recollect the aromatics now. I don't recollect what aromatics were used in it.

X. Q. 37. What I am trying to get at is what proportion of fig extract you put into the medicine.

A. No, sir; I cannot recollect the quantity we used.

Redirect Examination.

(By Mr. OLNEY.)

R. Q. 1. You are acquainted with this confection of senna, I understand?

A. Yes, sir; for many years past.

R. Q. 2. You have been for many years?

A. Yes, sir.

R. Q. 3. What are the principal ingredients of confection of senna?

A. Well, senna is the most active; senna and the cassia fistula.

R. Q. 4. But figs enter into the composition?

A. Yes, sir.

(Further hearing adjourned to January 6, 1899, at 10 A. M.)

Friday, January 6, 1899.

Counsel appearing:

For complainant, Warren Olney, Esq.

For respondents, John H. Miller, Esq., Purcell Rowe, Esq.

Mr. OLNEY.—Here are the exhibits which were attached to the bill of complaint, which have been already formally offered in evidence, and I ask that they be marked by the commissioner to correspond with the marks upon them as attached to the bill of complaint. For instance, the one marked "Exhibit D" shall be marked in this case "Exhibit D."

(Marked: "Complainant's Exhibit D.")

(Note by stenographer.—The several exhibits offered in evidence by him and were marked respectively as follows: "Complainant's Exhibit E," "Complainant's Exhibit F," "Complainant's Exhibit G," "Complainant's Exhibit H," "Complainant's Exhibit A," "Complainant's Exhibit B," "Complainant's Exhibit I," "Complainant's Exhibit C," "Complainant's Exhibit C1," "Complainant's C2," "Complainant's Exhibit C3.")

Redirect Examination of

WINSLOW ANDERSON, M. D. (resumed).

(By Mr. OLNEY.)

R. Q. 3. Dr. Anderson, in your opinion, is the complainant's compound, the production known as "Syrup of Figs," a quack medicine?

(Objected to as incompetent, irrelevant, and immaterial and responsive to no issue in this case.)

A. No, sir; I don't consider it a quack medicine.

R. Q. 4. What is your opinion as to its qualities?

(The same objection, and on the further ground that it

is not a question for opinions, and, therefore, opinions are not proper, but only facts.)

A. It is a pleasant laxative.

R. Q. 5. What do you know in regard to its efficiency?

(The same objection.)

A. It is an efficient laxative.

R. Q. 6. What do you know in regard to its freedom from objectionable qualities?

(The same objection.)

A. I have never seen any objectionable results from its use.

R. Q. 7. Do you know whether it is free from griping qualities?

(The same objection.)

A. I have never known it to gripe in ordinary doses.

R. Q. 8. You have used it, as I understand you, in your direct testimony before, in your practice?

A. Yes, sir.

R. Q. 9. Have you used it personally?

A. Yes, sir.

R. Q. 10. Have you prescribed it to your patients?

A. Yes, sir.

R. Q. 11. What can you say as to whether or not it is a good laxative or a poor one?

Mr. MILLER.—We object to that as incompetent, irrelevant, and immaterial, on the ground that it is not a suit to test the quality of complainant's medicine, but only to test his right to the name of the medicine, and whether it be good, bad, or indifferent is not material; and we object decidedly to lumbering up the record with irrelevant and immaterial matter, and only increasing

the expense and cost of the trial and in lengthening it out in this indifferent manner.

Mr. OLNEY.—Counsel's objection is very extraordinary after having called witness after witness and filling many pages of the record to show that it is not a good medicine.

A. It is as good a general laxative as I know of.

R. Q. 12. What can you say as to the reason for its excellence?

Mr. MILLER.—We make the same objection; and furthermore, if the medicine is excellent it is utterly immaterial as to why it is excellent, the question being whether it is excellent or not. The testimony is argumentative.

A. I presume its ingredients and their method of preparation.

R. Q. 13. (By Mr. OLNEY.)—Does the method of preparation of a medicine have any effect upon the quality of the medicine?

A. It has a decided effect on the action of the medicine.

R. Q. 14. Suppose, Doctor, that two medicines, prepared by two different persons contain the same chemical ingredients, could the method of preparation adopted by these different parties have any material effect upon the qualities of the two medicines?

Mr. MILLER.—We object to that as incompetent, irrelevant, and immaterial, on the ground that this witness is not an expert pharmacist or chemist, never having been shown to have put up a prescription in his life, but is a practicing physician, his profession being entirely differ-

ent from that of the pharmacist, in compounding prescriptions.

A. I should say, yes.

R. Q. 15. (By Mr. OLNEY.)—I show you, doctor, a formula for the preparation of medicine, marked "Respondent's Exhibit No. 6," and call your attention to the ingredient of alcohol in that formula? A. Yes, sir.

R. Q. 16. In your opinion does that formula contain enough alcohol to be improper in a prescription or in medicine used by children?

Mr. MILLER.—We object to that as incompetent, irrelevant, and immaterial, on the ground that the witness is not shown to be an expert in the matter of preparing and putting up prescriptions, and is not shown to have put up one in his life, and I don't believe he has. If he is an expert in that matter, then it is proper first to show it.

A. As a rule we don't administer alcohol to children excepting for certain specific diseases. This practically makes an elixir of approximately twenty-five per cent of alcohol, roughly guessing, and as a rule, I do not administer elixirs containing alcohol—of course, to children—as a general practice.

R. Q. 17. (By Mr. OLNEY.)—Why?

A. Because, first, there is always a tendency to establish a habit; second, there would be some danger of irritating the intestinal canal by the continuous use of an elixir. Those are the objections to the use of elixirs for young children.

R. Q. 18. Do you observe that henbane is used in that formula?

A. Hyoscyamus, yes, sir.

R. Q. 19. In your opinion is henbane a proper ingredient to use in a medicine for children?

A. I would not use it in a laxative for children nor for delicate females. It is, however, used in laxatives for grown persons.

Recross Examination.

(By Mr. MILLER.)

R. X. 1. Your objection to using alcohol, then, is that you are afraid that it would create an appetite for drinking or create a liking for liquor, in the first place, and in the second place, that its continued use would irritate the intestinal canal. Is that what you mean by your testimony regarding the presence of alcohol in this medicine?

A. Yes, sir.

R. X. 2. You are really serious in that testimony, are you? A. Absolutely.

R. X. 3. Now, in regard to the use of henbane in there, are you not well aware that henbane is used in a great many laxatives, and that it is not considered to be bad practice by physicians of reputation when used in a proper quantity?

A. For adults laxatives are frequently combined with hyoscyamus. For children I would not use it.

R. X. 4. Do you not know that in some of the standard laxatives as laid down by the pharmacopia, some of which are in evidence in this case, that henbane is one of the constituents of those standard laxatives?

A. I believe that to be a fact.

R. X. 5. Now, do you know that this syrup of figs is considered by the great majority of practicing physicians in this city to be what is known as a quack medicine?

A. No, sir.

R. X. 6. Have you not heard of physicians considering it as a quack medicine? A. I can't say that I have.

R. X. 7. What do you call a quack medicine?

A. One whose advertisements are not received by the journal of the Medical Association. One whose ingredients are unknown to the medical profession.

R. X. 8. Yes. And when a medicine is put on the market whose ingredients are unknown, that is to say, the formula is unknown, then it is considered as a quack medicine?

A. It is considered an ethical proprietary medicine first, when received by the organ of our great association; second, when the ingredients are known, printed—an ethical proprietary preparation.

R. X. 9. The point I ask is this, and it is susceptible of an easy answer, because it is a matter that ought to be well known among medical men: is a quack medicine a medicine whose ingredients are not known to the profession, nor the formula by which it is made?

A. One whose ingredients are unknown I should consider a quack medicine.

R. X. 10. Now, will you tell me what the ingredients of this syrup of figs are?

A. The active principle, I believe, from using it, its therapeutic action is due to senna.

R. X. 11. Now, I didn't ask what the active principle was. I asked you for all of the ingredients of that medi-

cine, to wit, the formula, I will call it, by which it is made.

A. The formula I don't know. I know the ingredients in so far that I believe it is senna with aromatics and carminatives.

R. X. 12. Do you know all of the ingredients?

A. I do not.

R. X. 13. Do you know the proportions of any of the ingredients? A. I do not.

R. X. 14. Have you ever known them, or heard them?

A. I have not.

R. X. 15. Do you know it to be a fact that Mr. Queen keeps the matter as a secret, and that he has refused to disclose it in this case?

A. I didn't know that he had refused to disclose it. I don't know the actual component parts, grain for grain. That is what I can't testify to.

R. X. 16. Is it not a fact that none of the medical profession generally knows the constituent parts of that medicine?

A. They all know the published statement that it is senna with pleasant aromatics and carminatives.

R. X. 17. Can you tell from that medicine whether there is any hyoscyamus in it?

A. I have not analyzed it.

R. X. 18. Can you tell from its taste? A. No.

R. X. 19. Or its smell? A. No.

R. X. 20. Could you tell from any other way than by its analysis?

A. Yes, the therapeutic effects of henbane are well known.

R. X. 21. Now, is there any henbane in it?

A. I believe not.

R. X. 22. Inasmuch as you don't know the constituents of this medicine why is it that it is not placed by you in the category of a common, ordinary quack medicine?

A. For the same reason that phenacitine, antikamnia, bromidia, and many other known ethical proprietary preparations are considered ethical and used by the majority of physicians.

R. X. 23. Are you aware that certain of the prominent physicians in this city have testified in this case that this is known as a quack medicine? A. I am not.

R. X. 24. If they had, would that have any effect in weakening your position in regard to your opinion as to whether it was a quack medicine or not?

Mr. OLNEY.—We object to that. No such testimony has been given; therefore it is not a fair hypothesis to present to the witness.

Mr. MILLER.—I will state on the record that the testimony has been given, and the counsel's memory is exceedingly short, if he does not remember it.

Mr. OLNEY.—My memory is not short. My memory is accurate.

Mr. MILLER.—I withdraw the whole business. It is immaterial. I cannot waste time on such trifles as that.

R. X. 25. Look at his formula No. 5, doctor, respondent's exhibit No. 5, and state if you know what that is?

A. This would make a syrup with a small percentage of alcohol in it.

R. X. 26. What percentage of alcohol would it make?

A. About two to three per cent.

R. X. 27. Now, what kind of medicine would that make? A. A laxative therapeutically.

R. X. 28. Would you be able to tell from the medicine itself, after it was made, without any analysis, any of its constituents?

A. I think the taste of senna would be apparent here.

R. X. 29. Could you tell any other ingredient by the taste? A. Sugar.

R. X. 30. Any other?

A. Possibly the cinnamon or the cloves by the smell or taste, or the anise by the taste or smell.

R. X. 31. Could you tell the ginger?

A. I should think one would be able to tell the ginger by the taste. I am not sure about that.

R. X. 32. Then you could tell all the different ingredients, could you?

A. Well, that would be a little difficult without an analysis—for me, at least.

R. X. 33. Will you please take this bottle which is labeled respondent's exhibit No. 3 and taste the contents, and see if you can tell any of the ingredients of it?

A. I am not in very good tasting condition this morning, Mr. Miller. (Tastes.) Well, there is certainly some sugar in this, at any rate. There is a bitter principle that tastes something like senna. (The witness rubs a portion of the liquid in the palms of his hands, to get the odor.) I believe there is some peppermint in it. Further than that it is rather difficult to determine accurately without analysis.

R. X. 35. Could you tell whether there is any fig juice in it or not? A. I don't believe I could.

R. X. 36. Now, just take this other bottle, marked respondent's exhibit No. 4, and see if you can tell any difference between the two medicines?

A. You haven't got a little water here, have you? My taster is filled with No. one. (The witness rinses his mouth.) Well, that tastes very similar to what I have been using as "Syrup of Figs." The aromatics were so blended that it is exceedingly difficult to determine any one particularly. I believe I get a little peppermint and, possibly, a little ginger.

R. X. 37. Can you detect any substantial difference between the two samples that you have tasted?

A. Yes, the first is bitter; the second is not. The first is decidedly bitter. In this I believe the taste of senna is not nearly so bitter as in the other, in my judgment.

R. X. 38. Senna is bitter, then, is it?

A. Yes, sir.

R. X. 39. Then the bitter taste in the first one you judge comes from senna, do you?

A. I should think the first was senna.

R. X. 40. Would you think there was any senna in the last one—in the second one? A. I believe there is.

R. X. 41. More or less than in the first one?

A. From the taste one would think there was more in the first on account of its bitterness. It is a cathartic acid I believe, whatever the bitter principal extract is.

R. X. 42. Senna appears to be stronger in the first one than in the second one, then?

A. Yes, from the taste I would judge so.

R. X. 43. Then from the taste you would judge that the first one was stronger in senna than the other?

A. If that bitter principal be due to senna, one would say that the first one was stronger.

R. X. 44. Now, will you please look at this bottle, respondent's Exhibit No. 2, and state if you can tell what that is.

A. Well, this is undoubtedly a syrup, and has the flavor of figs, I believe. My hands are all covered with the other. I can't tell by the odor.

R. X. 45. You can detect the flavor of fig, can you?

A. I think so.

R. X. 46. There is no trouble about that at all?

A. No, sir.

R. X. 47. Can you detect anything besides the fig?

A. Syrup—sugar.

R. X. 48. I mean anything besides the sugar and the fig? A. I am not sure at this minute.

R. X. 49. Now, look at this other bottle, complainant's Exhibit No. 1, and state if you can determine what that is.

A. I believe that is a weaker syrup, a less sweet syrup, perhaps flavored with figs, and I think a small portion of alcohol.

R. X. 50. Do you detect the flavor of figs in there?

A. I think I do.

R. X. 51. It is very prominent, is it not?

A. Yes, I think so.

R. X. 52. What else do you detect in there besides figs?

A. I think I detect a small quantity of alcohol.

R. X. 53. You detect sugar, also, do you not?

A. Yes, sir.

R. X. 54. Then, as between the last two samples which are handed you, Exhibits Nos. 1 and 2, do you find any practical difference between the two so far as you can tell by the taste? and if so, what is it?

A. Which is the first one I had?

R. X. 55. The first one you had was number 2.

A. I believe that is the sweeter of the two, containing a little more sugar.

R. X. 56. Have you ever had any experience in practical pharmacy, such as preparing and compounding prescriptions? A. No, sir.

R. X. 57. I understand your experience has been only in the line of a practicing physician?

A. I have taught chemistry for a number of years in the University.

R. X. 58. Did you ever study pharmacy?

A. No, sir.

R. X. 59. You are not a graduate from any pharmaceutical school, then, are you? A. No, sir.

R. X. 60. Referring again to respondent's Exhibit No. 6, the formula, do you know what the alcohol is put into the preparation for?

A. To prevent fermentation; and for the purpose in general, outside of this preparation—I don't know why this was put in here, of course—alcohol is used as a solvent for the alcoloids, the extraction of organic drugs.

R. X. 61. I mean was it put in for the purpose of extracting the essential part of the drugs?

A. Yes; alcohol is used also to prevent fermentation.

R. X. 62. Now, is there any more alcohol in that formula than is necessary for those two purposes?

A. Without being scientifically accurate, I should say yes. I don't believe it is essential to have 25 per cent of alcohol to prevent fermentation.

R. X. 63. You stated that the object of the alcohol was, first, to extract the essential principles from the drugs; and, second, to prevent fermentation of the medicine. Now, I ask you, is there any more alcohol than is necessary in that medicine for those purposes?

A. I should say yes, with this reservation, that I would have to look into the matter scientifically; in other words, I would not be positive on that point. But I am of the opinion that there is more there than is essential for those purposes.

R. X. 64. That simply arises from a superficial observation and examination of the matter that you have given it on the witness stand?

A. Yes, sir; principally that.

R. X. 65. You would not undertake to be accurate or exact? A. No, sir.

R. X. 66. That is a scientific matter that could be decided, is it not? A. It is so.

R. X. 67. Alcohol is one of the expensive products, is it not? A. It is.

R. X. 68. It would be a little absurd, then, if a first class firm would use more alcohol in a medicine than was necessary for the purposes intended, would it not?

A. That would be extravagance.

R. X. 69. As well as a bad practice, would it not?

A. Yes, sir.

R. X. 70. Are you the editor of a medical journal here?

A. Yes, sir.

R. X. 71. Which journal is that?

A. The "Pacific Medical Journal."

R. X. 72. Is that the medical journal in which the Syrup of Figs Company advertises its medicine?

A. It is.

R. X. 73. They have a whole page there, have they not? A. They have.

R. X. 74. How long have they been running that advertisement there? A. Six or eight years, I think.

R. X. 75. Then they are one of the old advertisers and patrons and supporters of this "Pacific Medical Journal"? A. Yes, sir.

R. X. 76. Is there any other editor of this journal?

A. Yes, sir.

R. X. 77. Who else?

A. Dr. W. F. Southard is managing editor and Dr. D. A. Hodghead is associate editor.

R. X. 78. That is Dr. Hodghead who has already testified in this case on behalf of complainant, is he not?

A. I have not heard him testify. I have seen him here in the room.

R. X. 79. Were you not here when Dr. Hodghead testified in this case? A. No, sir.

R. X. 80. Where is Dr. Hodghead's office?

A. 1220 Sutter.

R. X. 81. And where is your office?

A. 1220 Sutter.

R. X. 82. Where is the office of Dr. Southard?

A. 1220 Sutter street.

R. X. 83. And where is the office of Dr. McNutt?

A. 1220 Sutter street.

R. X. 84. And where is the office of Dr. Woodward?

A. 1220 Sutter street.

Mr. MILLER.—Yes, I thought so.

Redirect Examination of

WINSLOW ANDERSON, M. D.

(By Mr. OLNEY.)

R. Q. 1. Do you have charge of the advertisements in the "Pacific Medical Journal"? A. Yes, sir.

R. Q. 2. Have the respondents here, Clinton E. Worden & Co., advertised in that journal?

A. For many years.

R. Q. 3. Do they have a full-page advertisement?

A. They do.

R. Q. 4. I understand you to say that you understood the ingredients of the complainant's preparation, "Syrup of Figs," from the statements that had been made, and, also, from your use of it, from the therapeutic effects as you observed them? A. Yes, sir.

R. Q. 5. Are you able, doctor, from such use as you have made of it, and observation of its effect, to come to a substantially correct knowledge of the ingredients of such a medicine as the complainant's?

A. I think so.

R. Q. 6. Can any physician in good practice do the same thing? A. I should think so.

R. Q. 7. Referring to the formula, Exhibit No. 5, where you said there was about two per cent of alcohol, I ask

you if there was more alcohol in that preparation than is necessary to prevent fermentation?

A. I should say not more.

Recross-Examination.

(By Mr. MILLER.)

R. X. 1. Is it not a fact that medical journals of first-class standing very frequently publish advertisements of quack medicines for which they are paid just as for other advertisements?

A. First-class journals do not.

R. X. 2. I show you complainant's exhibit "O," and ask you to look at page 14 of the advertisements and state if that is not the advertisement of a quack medicine?

A. No, sir.

R. X. 3. What is it?

A. A recognized ethical proprietary preparation used extensively by everybody.

R. X. 4. What is the name? A. Trional.

R. X. 5. Does the advertisement show what the constituents are?

A. It does not; but it is known to be a derivative of the coal tar products.

R. X. 6. Now, look at the advertisement on page 13, a medicine called pincoline, and state what that is.

A. That is understood to be an oil of tar prepared with vaseline as a base.

R. X. 7. Does that advertisement state what the constituents are?

A. I think not. Their literature, however, does. Yes, it says here: "An etherial extract of the needles of the pine, pinus punileo," &c.

R. X. 8. Now, I show you another one, the cover of the page entitled "Glycozone," and ask you what that is?

A. Yes, sir.

R. X. 9. What is that?

A. That is a preparation of $H^2 O^2$.

R. X. 10. What is that used for?

A. An intestinal antiseptic; gargles; mouth washes.

R. X. 11. Does this advertisement state what its constituents are?

A. I think not, but their literature does.

R. X. 12. Now, in these advertisements which I have shown you so far, do any of them state what the constituents are? A. No, sir.

R. X. 13. Now, I show you another on page 15, entitled "Sanmetto," and ask you if you know what that is?

A. Yes, that is a pleasant preparation of sandal wood oil.

R. X. 14. Does this advertisement state what the consituents are?

A. "The scientific blending of true sandal and saw palmet to."

R. X. 15. So that this last one which I showed you does state what it is made of, does it? A. Yes, sir.

R. X. 16. Whereas the others did not?

A. Yes, sir.

R. X. 17. Now, I show you another, a medical journal here, marked complainant's exhibit N, "Humanity and Health."

A. We do not consider that as a medical journal.

R. X. 18. What do you consider it, then?

A. As a popular quasi-scientific journal. It is not a medical journal in the true sense of the word.

R. X. 19. Is that such a journal as you would expect to find advertisements of quack medicines in?

A. Yes. I can understand that quack remedies might be introduced into such journals, with others.

R. X. 20. I show you an advertisement on the cover of this journal, entitled, "The Electropoise, by the Electro-libration Company of New York," and ask you if you consider that to be in the line of a quack remedy?

A. Yes, sir; I should say that was in the line of an advertisement that would not be accepted by the journal of the American Medical Association.

R. X. 21. Is it not a fact this electropoise is generally known to people at large to be a quack remedy and a fraud?

A. It is simply a mild electric battery, scientifically, and its claims, of course, are not borne out by the facts.

R. X. 22. It claims to cure a great number of diseases, does it not? A. Yes, sir.

R. X. 23. As a medical man you know perfectly well that it will not perform those cures, do you not?

A. Yes, sir.

R. X. 24. Therefore, it is purely a quack remedy, is it not? A. Yes, sir.

R. X. 25. In what light do you consider a journal called "The Trained Nurse and Hospital Review"?

A. As a popular journal for nurses; not a medical journal.

R. X. 26. That would come in the same line as the

journal which I just handed you a moment ago, entitled "Humanity and Health," would it? A. Yes, sir.

R. X. 27. Those journals are supposed to advertise almost any kind of a medical remedy that they can get an advertisement for, are they not? A. Yes, sir.

R. X. 28. More in the nature of a business paper than of a medical journal, is it not?

A. An advertising medium; yes, sir.

R. X. 29. In fact, they are principally advertising mediums, are they not, and the reading matter is subsidiary to it? A. Frequently issued by manufacturers.

R. X. 30. Now, in what light do you consider "The Dietetic and Hygienic Gazette and Medical Journal," marked as "Complainant's Exhibit M"? I will hand it to you.

A. I consider that a legitimate journal. I am quite familiar with it.

R. X. 31. That is a medical journal, is it?

A. It is.

R. X. 32. That is on a different line from the other two that I handed you, is it? A. Yes, sir.

R. X. 33. Is the book marked "Complainant's Exhibit K," called "The Annals of Hygiene, a Journal of Health," a legitimate medical journal, or an advertising medium?

A. No; that is a legitimate medical journal.

R. X. 34. How is it with regard to the "American Analyst," marked "Complainant's Exhibit Q"?

A. I don't know it.

R. X. 35. You don't know anything about that?

A. No, sir.

R. X. 36. Now, here is another one, marked "Jenness Miller's Monthly." Is that a legitimate medical journal?

A. No, sir; that is a popular journal.

R. X. 37. Well, that is an advertising medium, is it not? A. Well, on those lines I should say.

R. X. 38. Here is another one, entitled "Food," marked "Complainant's Exhibit L." Is that a legitimate medical journal? A. Yes, sir.

Redirect Examination.

(Mr. OLNEY.)

R. Q. 1. Doctor, you have used the expression "ethical" in relation to journals and advertisements and prescriptions received as advertisements. A. Yes sir.

R. Q. 2. What do you mean by that term "ethical"?

A. As to advertising, there is a council composed of prominent members of the American Medical Association to whom all advertising matter must go before it is accepted by their organ, the "Journal of the American Medical Association." When this committee passes on an ad. and allows it to be printed in this journal—

R. Q. 3. (Interrupting.) An ad., did you say?

A. An ad.; an advertisement; and permits it to be printed in their organ which represents the American Medical profession in this country, such advertisements are considered ethical by the medical profession.

R. Q. And the advertisements of the California Syrup of Figs, the advertisement of the California Fig Syrup Company, in advertising its medicine, are considered ethical, as I understand it?

A. Yes, they are accepted by this board as such.

R. Q. 5. Now, what is the rule in regard to physicians in regular standing prescribing medicines that are advertised in this medical journal? Are they at liberty to do it?

A. Yes, sir; otherwise they would not be advertised in that journal.

R. Q. 6. But a physician is not deemed to have done an unprofessional act when he prescribed a remedy advertised in this medical journal?

A. Certainly not. It is placed there for the use of the American medical profession.

R. Q. 7. Now, is it not a fact, doctor, that there are many preparations now made, proprietary preparations, that are made, can be made and are made, cheaper and better in large quantities, and for that reason physicians prescribe them in their practice? A. Yes, sir.

R. Q. 8. Referring to the griping quality of senna, I will ask you if the griping quality can be extracted from the senna itself, would it not be better than to overcome the griping quality of senna by putting in the preparation other articles? A. I should say undoubtedly.

Examination in chief of

GERALD J. FITZGIBBON, M. D., a witness called on behalf of complainant; sworn.

(By Mr. OLNEY.)

Q. 1. What is your name?

A. Gerald J. Fitzgibbon.

Q. 2. What is your profession?

A. Physician and surgeon.

Q. 3. Where do you live? A. San Francisco.

Q. 4. How long have you practiced your profession in San Francisco? A. Since 1878.

Q. 5. Are you a graduate of any medical school or college? A. Yes, sir.

Q. 6. Where?

A. The Medical College of the Pacific.

Q. 7. Any other?

A. Well, I have a diploma from the Cooper, too.

Q. 8. Do you occupy any official position at the present time? A. Yes, sir.

Q. 9. What it is?

A. Well, I am a member of the Board of Health.

Q. 10. How long have you been a member of the Board of Health?

A. Since three years and a half; about three years and a half.

Q. 11. Are you acquainted with a medicine known as "Syrup of Figs," put up by the California Fig Syrup Company? A. Yes, sir.

Q. 12. How long have you known that medicine?

A. For a good many years.

Q. 13. Do you know whether or not it is prescribed by physicians in good standing in their practice?

A. Yes, sir.

Q. 14. Do you prescribe it yourself?

A. Yes, I do not write the prescriptions, but I prescribe it.

Q. 15. Do you know from actual observation and experience what its action is? A. Yes, sir.

Q. 16. Is it or is it not a good medicine?

A. Yes, sir.

Q. 17. How does it compare with any other laxatives that you know of on the market?

A. I don't know. I like its action because it is mild, pleasant and agreeable for children to take; that is all.

Q. 18. Have you heard anything in regard to its principal ingredients? A. Yes, sir.

Q. 19. How? A. By Mr. Queen some years ago.

Q. 20. Can you tell from your taste of it and your observation of it what the essential ingredients are?

A. I can't tell from the taste. I think it is senna.

Q. 21. Can you tell from its therapeutic effects what the principal ingredients are?

A. I can tell from its therapeutic effects, but I can't tell what is in the bottle by tasting. It takes a wise man to tell what is in a bottle by tasting.

Q. 22. If a man can do it he is a pretty wise man?

A. Yes, sir.

Q. 23. And a good chemist? A. Yes, sir.

Q. 24. You have observed the effects of this medicine?

A. Yes, sir.

Q. 25. And from observation are you able to state what the essential ingredients are, or what they must be?

A. Yes, sir.

Q. 26. I show you respondent's exhibit No. 6 and call your attention to the ingredient there of alcohol. Please look over exhibit No. 6 and state whether or not in your

opinion that is a proper remedy to be administered to children? And if so, state why it is, or if it is not, why it is not.

A. Well, about the remedy, the only objections to a remedy of that kind without a doctor's prescription would be the hyoscyamus, in my opinion. Of course, in giving this "Syrup of Figs" I tell my patients, if they will simply ask me "What will I give the child for a physic"? I say "You can give 'Syrup of Figs.' It is a pleasant and agreeable as anything I know of, and it is harmless.'" Of course, this other may be harmless, but hyoscyamus in some cases is dangerous. It depends entirely upon the individual. But if I were to give a prescription of hyoscyamus I would be careful in regard to the person to whom I was to give it.

Q. 27. I call your attention to the amount of alcohol there and ask you if in your opinion there is more alcohol than should be used.

A. Well, I don't know. I am not posted. I am not a druggist. I don't know anything about the proportion. But a little alcohol does no harm. The principal objection I have there is the promiscuous use of hyoscyamus.

Q. 28. Have you had the complainant's remedy, the syrup of figs, in your family? A. Yes, sir.

Q. 29. Do you know whether it gripes or not?

A. It does not; no.

Q. 30. It does not gripe? A. No, sir.

Cross-Examination.

(By Mr. MILLER.)

X. Q. 1. When you say that it does not gripe I presume you mean that it does not, or that it has not done so in cases that came under your immediate observation?

A. I have not heard any complaints in regard to its griping. That is the reason I order it. Sometimes I am asked for a family remedy, a physic, and I say "Syrup of Figs' is pleasant and agreeable and it does not gripe." Of course, it may gripe in some cases. If it does I don't know anything of it.

X. Q. 2. It is a fact that medicine will act differently on different people sometime, is it? A. Yes, sir.

X. Q. 3. It is not impossible, then, that this medicine might have had a griping effect on people in other situations than those on whom it was under your practice?

A. It is not impossible; no.

X. Q. 4. Now, in what way have you prescribed this when you did prescribe it? A. "Syrup of Figs"?

X. Q. 5. Yes, sir.

A. Well, I would tell people to take a dose of "Syrup of Figs."

X. Q. 6. You never wrote out a prescription for it, did you? A. No, sir.

X. Q. 7. Why didn't you write out a prescription for it, doctor? A regular doctor's prescription?

A. Well, because I don't think it is necessary to write out a prescription to tell a person to take a dose of "Syrup of Figs" or to take a dose of black draft or a

bottle of citrate of magnesia or compound licorice powder. I don't write a prescription for castor oil and I don't write a prescription for Garfield tea, nor Hamburg tea, or anything of that kind. I tell them to get it.

X. Q. 8. If you came to a person and found him sick would you not write out a prescription for castor oil?

A. It is not necessary. I would tell the nurse to give it.

X. Q. 9. You mean to say that there are some medicines that you simply tell people to go and get instead of writing out a prescription and keeping a record of it?

A. Yes, sir; it is not necessary to write out a prescription in many cases. If a man tells me he is in need of something of the kind I tell him to take a dose of castor oil.

X. Q. 10. If you had to send to a druggist for it wouldn't you write out a prescription?

A. No, sir; I would tell them to send up castor oil or a bottle of citrate of magnesia or whatever was necessary.

X. Q. 11. Suppose there was no nurse there?

A. Well, there is always somebody to take care of a man when he is very sick. If a person is very sick there is always someone there. And if a man is able to get around, surely he can go and get a dose of castor oil without my giving him a prescription.

X. Q. 12. I am not limiting you to that medicine alone. I am asking you why it is that you, as a physician, would prescribe for people in that way. Do you do it in cases generally? A. Yes, for physics.

X. Q. 13. When did you first hear of this "Syrup of Figs"?

A. Oh, it is a good many years ago. I don't remember how long ago. It is some years ago; ten or twelve years ago, or more.

X. Q. 14. In what connection?

A. Well, I have got youngsters and sometimes it is hard to get them to take physics, and a druggist told me, in the neighborhood, to give them some "Syrup of Figs."

X. Q. 15. Was that the first time you had used it?

A. Yes, and now I keep a bottle of "Syrup of Figs" in the house. I have kept it in the house ever since.

X. Q. 16. You got a bottle then on the recommendation of the druggist? A. Yes, sir.

X. Q. 17. You hadn't heard of it before that, had you?

A. Well, I don't remember whether I had or not.

X. Q. 18. When the druggist recommended it to you that way, of course, you didn't know what its ingredients were, did you?

A. Yes, asked the druggist what it was, and he said that the principal ingredients were senna and aromatics and carminatives.

X. Q. 19. You say the druggist told you what the ingredients were, did you? A. Yes, sir.

X. Q. 20. Why was it necessary to ask him what the ingredients were when you saw the name "Syrup of Figs" on the package?

A. Well, a man likes to know what he is giving.

X. Q. 21. Did you suppose you were giving them figs?

A. No, I thought it was flavored with syrup of figs.

X. Q. 22. What do you mean by saying that you supposed it was flavored with syrup of figs?

A. Well, I thought the syrup might be made from figs.

X. Q. 23. So as to give it a fig flavor?

A. Yes, sir; a flavor of the syrup. That the syrup might be made from figs.

X. Q. 24. You thought that something of that kind was in it? A. Yes, sir.

X. Q. 25. Did you ask the druggist what the actual ingredients were? A. I did at that time.

X. Q. 26. Now, when was it that Mr. Queen told you what the actual ingredients were?

A. Oh, it may be five or six years ago.

X. Q. 27. How did he come to do that?

A. I asked him what was in that "Syrup of Figs," and he told me then. Of course, I didn't ask him the exact proportions. He told me, I remember, that the principal ingredients were senna and aromatics and carminatives.

X. Q. 28. What was the occasion of your asking him?

A. Well, I have known Mr. Queen for some little time, and, when I saw him, naturally the subject of this "Syrup of Figs" came up and I asked him at that time what was in it. And then another time I appeared as a witness and I wanted to know what was in it before I came on the witness stand.

X. Q. 29. And you asked him? A. Yes, sir.

X. Q. 30. How long have you been friendly with Mr. Queen?

A. I don't know; for four or five or six years.

X. Q. 31. When was it you came to ask him about this "Syrup of Figs" or product? How long ago?

A. I don't remember; three or four years ago.

X. Q. 32. What was the occasion of it?

A. There was a case in Court, something like this trial.

X. Q. 33. Something like a lawsuit?

A. I think so; yes, sir.

X. Q. 34. He wanted you to testify, did he?

A. Yes.

X. Q. 35. And you wanted to know, of course, what the ingredients were, did you? A. Yes, sir.

X. Q. 36. Did you ask him what the ingredients were?

A. Yes, and he told me.

X. Q. 37. You wanted to know at that time, did you?

A. Yes, I asked him what was in this "Syrup of Figs." I told him that I wanted to know, as I was going on as a witness, and he told me.

X. Q. 38. Did you ask him how it was that he came to call this "Syrup of Figs" when you knew that figs would not do what he claimed?

A. I did not, because I was not interested.

X. Q. 39. Now, didn't it strike you that that was rather peculiar?

A. No, sir; because there are lots of things called by different names from what they really are. We have had samples of raspberry syrup in our department, and no raspberry in it.

X. Q. 40. Well, that would be a case of practicing a fraud, wouldn't it? A. That was, yes.

X. Q. 41. Because they labeled it raspberry syrup when there was no raspberry in it? A. Yes.

X. Q. 42. When was that?

A. Oh, that is some little time ago.

X. Q. 43. Where was it and how did it happen?

A. That happened with some samples of raspberry syrup that we got.

X. Q. 44. What was that? Something that came under the observation of the Board of Health?

A. Yes, sir.

X. Q. 45. Some one was selling stuff and labeling it raspberry syrup, were they? A. Yes, sir.

X. Q. 46. You found, however, that it had no raspberry in it? What did you do about it?

A. I forget exactly what was done. I only bring it up as an instance.

X. Q. 47. What do they generally do in such cases as that? A. They condemn it, of course.

X. Q. 48. They destroy it when they find that it has no raspberry in it? A. Yes, sir.

X. Q. 49. Notwithstanding the fact that it was being sold as raspberry syrup? Is that the fact?

A. Yes.

X. Q. 50. Now, when Mr. Queen told you that the active constituents of his medicine were senna and carminatives and aromatics, did he tell you all of the constituents? A. He did at that time; yes, sir.

X. Q. 51. What were they? A. I forget.

X. Q. 52. He didn't write them down for you, did he?

A. No, sir; I didn't ask him for it

X. Q. 53. And you don't remember what they were?

A. No, sir; I do not.

X. Q. 54. Can you remember any of them?

A. I remember that he said that the active principle in it was senna, and that is what all of these remedies depend upon, as their active principle—that is, the majority.

X. Q. 55. The laxatives?

A. The majority of proprietary remedies, such as "Castoria," Hamburg tea, Garfield tea and "Syrup of Figs." Of course, we have to take the manufacturers' word. We are not all chemists.

X. Q. 56. What else do you remember was in it?

A. That is all I remember.

X. Q. 57. You know what confection of senna is, do you not? A. Yes, sir.

X. Q. 58. There is very little difference between this "Syrup of Figs" and confection of senna, isn't there?

A. I don't know that. I think confection of senna will gripe under ordinary circumstances.

X. Q. 59. What is put into this medicine to prevent griping?

A. I suppose the aromatics and carminatives, and possibly ginger or peppermint or something of that kind. I don't know. You can't prove anything by me by tasting. I am not a very good hand at tasting.

X. Q. 60. I hand you this bottle, exhibit No. 3, and ask you if you can tell by tasting what it is?

A. No, sir. For instance, I can write a prescription and the principal ingredient may be quinine and I may

put in several other things, and it will be impossible to tell that there is any quinine in it. And I may, of course, get a bottle that tastes a little of a certain ingredient and there may not be any of that ingredient in that bottle. It is impossible, in my opinion, to tell what is in a bottle by tasting.

X. Q. 61. Certainly you couldn't tell any more than the most prominent characteristics, could you?

A. No, I don't think so.

X. Q. 62. As for telling the constituents that enter into it in very small proportions, it would be impossible to do that, would it?

A. That is my opinion; yes, sir.

X. Q. 63. Well, I ask you to look at this bottle No. 1 and see if you can tell what it consists of?

A. That is by tasting? I don't think so

X. Q. 64. You can try; taste it and see.

A. (After tasting.) Well, there is a flavor of senna, as far as I can tell.

X. Q. 65. Now, try this one. (Handing witness another bottle.)

A. After tasting one, you get the same taste in the whole.

X. Q. 66. Try this one, exhibit No. 2, and see if you can tell what that is by tasting.

A. That is very sweet; no bitter taste to that.

X. Q. 67. What flavor does it have?

A. It tastes like syrup to me.

X. Q. 68. It has a syrup flavor? See if you can tell by tasting.

A. I can't tell. This bottle that I tasted first has a slight bitter taste.

X. Q. 69. You are not much of a taster then, are you?

A. No, sir.

X. Q. 70. Where is your office now, doctor?

A. 21 Powell.

X. Q. 71. You are still a member of the Board of Health, are you?

A. Yes, sir; and for a while yet, I guess.

X. Q. 72. Your term is about expired now?

A. Yes. I am not in this, I want you to understand, in my official capacity. That has nothing to do with this. I am not here as a witness on that account.

Redirect Examination of

RICHARD E. QUEEN.

(By Mr. OLNEY.)

R. Q. 1. You know Mr. Alt, Mr. Queen?

A. I do.

R. Q. 2. Did you ever at any time give him a written formula for a prescription of "Syrup of Figs"?

(Objected to as incompetent, irrelevant and immaterial, because Mr. Alt never testified to anything of the kind.)

A. I did not.

R. Q. 3. Did you ever at any time give him any formula in any way for the manufacture of a medicine that left out figs in the preparation? A. I did not.

R. Q. 4. Did you at any time receive any information that Mr. Alt in the manufacture of "Syrup of Figs" at his

office in Glendale had omitted to use figs in the preparation?

(Same objection.)

A. That is, after I had been excluded by the management, by the stockholders.

R. Q. 5. You learned that for the first time then, did you? That he had omitted to use figs in the preparation?

A. Yes, I saw then for the first time the original of this formula which is presented here.

R. Q. 6. Then, as I understand you, that was after the trouble had commenced between you and Mr. Alt, and the other stockholders? A. It was.

R. Q. 7. Litigation was in progress between you?

A. Yes, sir. And I also saw the same formula or a similar one after the secretary who was removed from his office at the same time that Mr. Alt was removed from the presidency and turned over the books and formula to the new secretary of the company.

R. Q. 8. Did you ever at any time tell Mr. Alt to keep figs on exhibition? A. No, I did not.

R. Q. 9. Did you ever make any such statement in regard to the use of figs as he testified to here.

A. I never at any time instructed him to exhibit or to use any figs to deceive the public. I told him to use figs in making the preparation. I showed him the figs and turned over a sack to him at the same time I turned over to him the other materials. After having taught him how to make the remedy I turned over to him the figs which I had on hand, as I had the other materials. I showed him how to make the remedy, and told him that the figs

did not give strength to the medicine, that they were used because they were pleasant to taste, and helped to make a pleasant combination.

R. Q. 10. Did you ever dictate a formula which he or anybody else took down in writing?

A. No, I did not.

Recross Examination.

(By Mr. MILLER.)

R. X. Q. 1. Have you produced the things which I requested you to produce at the prior examination?

A. I have here the old style paper box which was in use at the time of the Stearns suit; you also asked for some advertisements which I have brought.

R. X. Q. 2. Is this carton which you now produce a sample of the ones used by you up to the time of the termination of litigation in the East against Stearns & Putnam? A. Yes, sir.

Mr. MILLER.—We offer this carton in evidence, and ask that it be marked "Respondent's Exhibit No. 16."

R. X. Q. 3. Now, you have also produced an advertisement, printed in German, French and Spanish, have you not? A. Yes, the inside bottle wrapper.

R. X. Q. 4. How long did you use these as the inside bottle wrapper?

A. That was in use until July, 1896.

R. X. Q. 5. By the way, I will ask you how long was this carton in use, exhibit No. 16. Up to what time?

A. Up to July, 1896.

R. X. Q. 6. That was the date at which you changed the carton and the bottle wrapper? A. It was.

R. X. Q. 6. Now, you also changed the bottle label, at the same time?

A. No, I changed the bottle label about two years before.

R. X. Q. 7. But at this last time mentioned you changed the carton and the bottle wrapper?

A. Yes, sir.

Mr. MILLER.—I offer this in evidence, and ask that it be marked respondent's exhibit No. 17.

(Marked "Respondent's Exhibit No. 17.")

R. X. Q. 8. Now, have you produced any advertisements from newspapers which I requested you to produce? A. I have. (Produces.)

R. X. Q. 9. These advertisements are not the ones I requested because they are advertisements that were published in 1898. What I requested was the advertisements that you had published prior to July, 1896, or the time when you changed it to this present form of carton. Have you go any of these?

A. I think I have them all in evidence here substantially. This one was in use, I would state, prior to that time.

(Referring to the last produced.)

R. X. Q. 10. This one that you now produce was in use, was it, prior to July, 1896?

A. Yes, this has been in use for six or eight years past.

Mr. MILLER.—We offer this one in evidence, and ask that it be marked "Respondent's Exhibit No. 18."

(Marked "Respondent's Exhibit No. 18.)

R. X. Q. 11. You have no other of these advertisements here now, have you? A. I have not.

Mr. MILLER.—In regard to Exhibit "G," we admit that this package was prepared and put up by Clinton E. Worden & Co. for a drugstore known as the Ariel Pharmacy, and was put up on the order of said drugstore, and according to the order that was given by said drugstore as on the label contained thereon, and in preparing the same that Clinton E. Worden followed the instructions of said druggist.

Mr. OLNEY.—I will not take the admission.

Recross Examination of

CLINTON E. WORDEN.

(By Mr. OLNEY.)

R. X. Q. 1. Mr. Worden, I will ask you whether the defendant, Clinton E. Worden & Co., put up and sold complainant's Exhibits "D," "E," "F," "G," "H," and "I?"

A. I am not able to state.

R. X. Q. 2. Did Clinton E. Worden & Co. put up a medicine like, and enclose it in packages like this, marked like those marked Exhibits "D," "E," "F," "G," "H," and "I," or any of them? A. Yes, similar.

R. X. Q. 3. But you are unable to state with reference to the identity of these particular packages?

A. Yes, sir.

R. X. Q. 4. But you did put up and sell packages like these? A. Yes, sir.

Redirect Examination.

(By Mr. MILLER.)

R. Q. 1. Just state what were the actual circumstances under which you put up packages similar to that, how you came to do it?

A. We are manufacturers for the druggists, putting up for them everything that is legitimate and within the bounds of law. We have the requirements and facilities for printing and manufacturing that they could not have in a retail store. They come to us and ask us to get them up cough remedies, or a blood purifier, or ague remedy, or a laxative, and in a great many cases have their own formula. In some instances, they ask us to submit formulas; they then advise us as to the style of packages, reading matter, the title and imprint or the name at the bottom of the package on the front. We then submit them prices that their order can be undertaken at, and, if satisfactory, get up the printed matter, submit the printed matter and fill their order.

R. Q. 2. Was that the course followed in regard to these various exhibits, or medicine like these various exhibits that are offered in evidence here?

A. Up to the time of the decision in the Stearns suit, I very carefully avoided putting up a preparation called "Syrup of Figs," desiring to be on the correct legal side, although I had many inquiries, all orders were declined. After the decision, customers came to us and said that the United States Court of Appeals had rendered a decision favorable to Stearns and adversely to the Syrup of

Figs Co., and demanding us to put up for them, at the same time threatening to fill the order with other houses who would put it up for them, if we did not.

R. Q. 3. Now, here is a bottle label, Exhibit "D," which, according to the testimony of the complainant here, was bought from the drugstore known as the Hayes Street Pharmacy, in this city and county; I will ask you whether or not the proprietors, or some one on behalf of the Hayes Street Pharmacy, instructed you as to the kind of label to use, and especially with regard to the name "San Diego Fig Syrup Co."?

A. The San Diego Fig Syrup Co.? Yes, we simply filled the order.

R. Q. 4. Did you know who the San Diego Fig Syrup Co. was? A. No, sir.

R. Q. 5. You knew nothing about it? A. No.

R. Q. 6. You simply filled the instructions of this drugstore? A. Yes.

R. Q. 7. Now, here is a package marked "Exhibit E," which complainant testifies was bought at the Fairmont Pharmacy in this city and county; would the testimony which you have just given in regard to Exhibit "D" apply to this Exhibit "E" with the change of name of the drugstore?

A. It would, sir. We have so many orders that it is impossible for me to swear that they put up this package, but we do that kind of business and we had put up packages of "Syrup of Figs" in that way.

R. Q. 8. And, when you put them up for these drugstores on order, then you put them up according to their

instruction in the way in which they call for them, do you? A. Yes, sir.

R. Q. 9. Does that testimony apply to the name that is found on this package, "Fig Syrup Company"?

A. Yes.

R. Q. 10. Did you know who the Fig Syrup Company was? A. I did not.

R. Q. 11. Now, here is another package marked "Exhibit G," which complainant testified was bought of the Ariel Pharmacy, in this city and county. What have you to say in regard to it?

A. The same testimony applies to that.

R. Q. 12. It is labeled "New York Fig Syrup Company." Did you know who the New York Fig Syrup Company was? A. I did not.

R. Q. 13. Was that the name you were ordered to put on it by this Ariel Pharmacy?

A. That was the instruction.

R. Q. 14. Here is another one marked "Exhibit E." I believe you have already testified concerning that one.

A. Yes, sir.

R. Q. 15. Now, here is produced another one marked "Exhibit H." What have you to say in regard to that?

A. The same testimony applies to that as to the former, that we followed the instructions of our customers in the printing matter.

R. Q. 16. Now, is all the "Syrup of Figs" which is put up in these bottles on these orders made according to this formula, respondent's Exhibit No. 6, which has been offered in evidence here? A. Yes.

R. Q. 17. What is the object of putting in this formula the ingredient alcohol?

A. As a preservative and for the purpose of making a menstruum sufficient to extract the full qualities of the drugs used in the formula. If a preparation does not have sufficient alcohol pharmaceutically proportioned, it will ferment and blow up, the bottles break and soil the druggists' shelves, counters and other goods.

R. Q. 18. Now, do you put into the medicine any more alcohol than is necessary for this purpose?

A. No, sir.

R. Q. 19. Is alcohol an expensive ingredient?

A. It is.

R. Q. 20. How does it compare with the other ingredients as to expense?

A. It is the most expensive part of the formula.

R. Q. 21. It is not likely that you would put any more alcohol in than was necessary, if it is the most expensive of all these ingredients, is it? A. No, sir.

Recross Examination.

(Mr. OLNEY.)

R. X. Q. 1. Mr. Worden, do you remember having received such an order as you have mentioned from the Hayes Street Pharmacy?

A. From memory, I do not, but my books show that such an order was filled and the goods delivered and paid for.

R. X. Q. 2. Your books are not here in Court, are they?

A. No, sir.

R. X. Q. 3. Have you examined your books in regard to this particular item?

A. I have for all of the exhibits as submitted. I suppose they are the same.

R. X. Q. 4. Could you ascertain whether or not you have sold these goods, from your books?

A. Yes, sir.

R. X. Q. 5. Now, you had traveling agents out soliciting orders for this medicine, did you not, and you so testified?

A. Not exactly. I have salesmen who solicit such orders for many thousand preparations that a drugstore may require.

R. X. Q. 6. But this article is included among the articles that they are instructed to solicit for?

A. Not now; but up to the time this injunction was granted our agents were instructed to receive orders for "Syrup of Figs," but no special effort was made in that direction.

R. X. Q. 7. You had manufactured an article and it was in stock at the time you made these sales, I suppose?

A. We had manufactured a bottle we had not labeled or wrapped, because we could not intelligently label and wrap until the order was received.

R. X. Q. 8. Did you put up any medicine of this character which you labeled and wrapped before you received any orders?

A. No, sir; no, sir. We have hundreds of preparations and none of them do we label and wrap and carry in stock, of that character of preparation.

R. X. Q. 9. Did you authorize, or did to your knowledge any of your solicitors say to these druggists that they had the right to sell "Syrup of Figs"?

A. Not that I remember.

R. X. Q. 10. Didn't you instruct your solicitors to make that statement to druggists?

A. I have no positive recollection, but it is very apt to have been the case that after the decision of the Stearns case I did. It is very apt to be the case. It is reasonable to suppose that I told my representatives that the case had been decided in the higher courts, and that if our customers wanted this preparation, they could accept the orders.

R. X. Q. 11. Did you tell them to inform the druggists of that fact?

A. I have no recollection of any such instruction.

R. X. Q. 12. You are unable to tell whether you did or not, then?

A. I am inclined to think that I did not. This preparation is only a matter of very minor importance to me.

R. X. Q. 13. Did you ever give the codefendants in this action to understand that you would defend this suit yourself? A. No.

R. X. Q. 14. Did you ever say anything of that kind?

A. I have not met Mr. Queen for years.

R. X. Q. 15. No, no, but these codefendants, these drugstores who bought of you; have you any arrangement by which you defend for them?

A. No, sir; no, sir.

R. X. Q. 16. Did you ever tell them that you would defend the suit? A. No, sir.

R. X. Q. 17. As a matter of fact, who is defending this action? A. Well, I think I am.

R. X. Q. 19. And you alone? A. Yes, sir.

R. X. Q. 20. But, isn't there such an understanding between you and the other defendants?

A. No, sir.

R. X. Q. 21. There is not? A. No, sir.

Mr. OLNEY.—Counsel for complainant makes no objection to the fact that Exhibit No. 14 A and Exhibit No 14 B are not certified to, but we object to their introduction on the ground that they are incompetent, irrelevant, and immaterial and have no connection whatever with this case.

(By stipulation between the respective parties, the reading and signing of the depositions by the several witnesses in this case are waived.)

Further hearing continued subject to notice.

Wednesday, February 8, 1899, 2 P. M.

Counsel appearing:

For complainant, Warren Olney, Esq.

For respondents, John H. Miller, Esq., Purcell Rowe, Esq.

Examination in chief of

J. A. BRIGHT, a witness called on behalf of complainant; sworn.

(By the EXAMINER.)

Q. 1. What is your full name?

A. J. A. Bright.

Q. 2. What is your age, residence, and occupation?

A. My age, is forty-five; my residence, 626 Hayes street; my occupation, druggist.

(By Mr. OLNEY.)

Q. 3. Are you proprietor of the drugstore on Hayes street, called the Hayes Street Pharmacy?

A. Yes, sir.

Q. 4. How long have you been such proprietor?

A. A little over three years.

Q. 5. Are you acquainted with Clinton E. Worden & Co.? A. Only in a business way.

Q. 6. You are acquainted with them in a business way? A. Yes, sir.

Q. 7. Did you ever buy a preparation from them called "Syrup of Figs"? A. Yes, sir.

Q. 8. I show you plaintiff's Exhibit "D," marked "Hayes Street Pharmacy," and ask you if you at any time purchased from Clinton E. Worden & Co. that or a similar article? A. To the best of my memory I did.

Q. 9. Do you remember how you came to purchase it?

A. At the solicitation of his agent.

Q. 10. I noticed at the bottom of one face of Exhibit "D" there is the words "San Diego Fig Syrup Co." I will

ask how, if you know, that came to be put upon the bottle? A. No, I do not.

Q. 11. Did you give Worden & Co. any directions about that?

A. No, sir. Well, now, just let me qualify that; I think they gave me several names, different names that I could have—any one which I might wish—and I think in that way I selected "San Diego Fig Syrup Co." rather than "Worden & Co."

Q. 12. Then they presented you a list of names that you could select from? A. Yes, sir

Q. 13. Were they on printed slips, or how?

A. No; the agent presented it to me saying that I could have either of them that I wanted.

Q. 14. The names were given to you, were they?

A. Yes, sir.

Q. 15. You remember when this suit was brought, do you? A. Yes, sir.

Q. 16. Did you employ counsel to defend this suit?

A. No, sir.

Q. 17. Did you have any arrangement with Clinton E. Worden & Co. that they should defend you?

A. No; no arrangement except that the agent as he came around week by week told me that they were defending the case.

Q. 18. That they were defending the suit?

A. Yes, sir.

Q. 19. They were defending it for you, were they?

A. I didn't understand that. I understand that it all hinged on whether Worden had the right to manufacture.

Q. 20. But you didn't take any action in the matter at all? A. No, sir; not at all.

Q. 21. You didn't employ counsel? A. No, sir.

Q. 22. Do you remember whether or not Worden & Co's. solicitor came to you more than once before you bought the article?

A. Well, I would not hardly be able to say about that. My recollection is that he did several times before I bought.

Q. 23. Did he have anything to say to you about this "Fig Syrup" that he was trying to sell?

A. In what way do you mean?

Q. 24. I will ask you if he said any thing about it?

A. Well, of course, he recommended it.

Q. 25. Did he try to get you to buy it?

A. Yes, sir.

Q. 26. Did you furnish this man from Clinton E. Worden & Co. any design or name for the package?

A. No, sir.

Q. 27. What price did you pay Clinton E. Worden & Co. for this article?

A. I don't think I can tell now without consulting my books. I have not thought about it.

Q. 28. What did you retail it at?

A. I think it was twenty-five cents.

Q. 29. Did you make any profit on it?

A. Certainly. My recollection is that it was two dollars a dozen, but I am not positive about it.

Cross-Examination.

(By Mr. MILLER.)

X. Q. 1. Mr. Bright, what was the name of the agent that called on you? A. I think it was Mr. Gray.

X. Q. 2. What was his full name?

A. I could not tell you.

X. Q. 3. Had he been calling on you before in regard to any matter? A. Yes, sir.

X. Q. 4. What matter?

A. The matter of selling goods of Clinton E. Worden & Co.

X. Q. 5. Then you had been purchasing other goods from Clinton E. Worden & Co? A. Yes, sir.

X. Q. 6. Had they been in the habit of coming to you soliciting you to purchase articles from Clinton E. Worden & Co.? A. Yes, sir.

X.Q. 7. What kind of articles?

A. Oh, nonsecrets.

X. Q. 8. And amongst other goods on this particular occasion he solicited from you the purchase of some "Syrup of Figs"? A. Yes, sir.

X. Q. 9. And you did purchase it from him, did you?

A. I did.

X. Q. 10. Now, in regard to the name that appears on the label, why didn't you put your own name on it, or the name of Clinton E. Worden & Co.?

A. Because I didn't want it. I didn't want my own name and I thought the other name would perhaps sell better than Clinton E. Worden & Co. It was suggested

to me that I could have either one of these three or four different styles that they were making it in these different styles.

X. Q. 11. That is, this agent suggested that there were a variety of names from which you could select?

A. Well, a variety of names in which they put it up that I could select from; yes, sir.

X. Q. 12. And the agent submitted these names to you? A. Yes, sir.

X. Q. 13. And among them was this name of "San Diego Fig Syrup Co.," and you selected that one?

A. Yes, sir.

X. Q. 14. What made you think that this name was any better than any other name?

A. I don't know that I can tell you exactly now what made me think so; there are a number of reasons perhaps that I could give you why I thought so.

X. Q. 15. Well, that is what I am asking.

A. Take for instance a nonsecret of that kind, if you are selling to the public and it has a name that is somewheres away off, they buy it more readily than if it is at home; that is one reason, perhaps it is the principal reason why I selected the name San Diego. There is just one point that I wish to make plain, that the name, "San Diego Fig Syrup Co.," was not put there at my solicitation; that is, that I did not originate it.

X. Q. 16. You mean to say that you did not originate the name? A. Yes, sir.

X. Q. 17. And that was amongst other names that he submitted as proper names, and you selected that one?

A. As names that they were using.

X. Q. 18. And you selected that one, did you?

A. Yes, sir.

X. Q. 19. And you told them to put that one on the label, did you?

A. Well, I don't remember about that. As I remember it now they came up there soliciting for the sale of this "Syrup of Figs."

X. Q. 20. I am not speaking about that. I am speaking about the name.

A. Well, I will come to that in a moment, perhaps. When the order had been given and submitted to me he asked me whether he should put on Clinton E. Worden & Co. or San Diego—I think there were several names. I said "Well, make it San Diego."

X. Q. 21. In pursuance of that it was made up and sent to you? A. Yes, sir.

X. Q. 22. How much did you get?

A. I think it was a dozen; I am not sure about that.

X. Q. 23. You mean a dozen bottles?

A. Yes; I am not sure.

X. Q. 24. Which you sold at the rate of twenty-five cents a bottle?

A. Yes; that is my recollection.

X. Q. 25. Now, had you had other preparations put up for you by Clinton E. Worden & Co.

A. Not of my own formula.

X. Q. 26. Well, this was not of your own formula, was it? A. This "Syrup of Figs"; no, sir.

X. Q. 27. Whose formula was that?

A. I didn't have Clinton E. Worden & Co. put this up specially for me.

X. Q. 28. What other medicine had you had put up for you by Clinton E. Worden & Co.?

A. I didn't have any; I bought goods that they had already put up.

X. Q. 29. What goods?

A. I remember one thing, that was worm lozenges, and I think some cough syrup and perhaps some syrup of sarsaparilla. I don't remember just all.

X. Q. 30. Did these goods, as so put up, have the imprint "Clinton E. Worden & Co." on the label, showing that the goods had been manufactured by them?

A. Some of them had, perhaps, and some of them had not.

X. Q. 31. Now, with reference to those that had not, what goods were they?

A. The only goods that I can recollect, I think, was some worm lozenges which I had under my own name.

X. Q. 32. You had your own name put on these?

A. Yes, sir.

X. Q. 33. In regard to these, you had these manufactured for you, did you not?

A. No, I did not.

X. Q. 34. You took stock goods then and had your name put on as manufacturer?

A. It is customary to do so, yes. You can select from any formula and have your name put on it, or have their name on it.

X. Q. 35. And in this case you had your name put on it? Yes; these lozenges.

X. Q. 36. You sold them in that way, did you?

A. Yes, sir.

X. Q. 37. So that they were represented to your customers as being put up and manufactured by you?

A. No, I don't know as they were represented as being manufactured by me; they simply had my address on them.

X. Q. 38. The label represented it to that effect, didn't it? A. No; I don't think so.

X. Q. 39. Wasn't the object of putting your name on the label to show that they were manufactured by you?

A. I don't think that it stated that they were manufactured by me.

X. Q. 40. The label had your name on it as manufacturer, didn't it?

A. I don't know that I remember.

X. Q. 41. Wasn't that the effect of the label, to show or to give the impression that it was manufactured by you? A. I don't remember as to that.

X. Q. 42. What did you put your name on that label for? A. For an advertisement.

X. Q. 43. In what way? What kind of an advertisement? A. An advertisement of the store.

X. Q. 44. Just explain that more fully, what you mean by that; to advertise the store by putting your name on the label?

A. Well, we often do that; very often put our name on any kind of patent medicine, simply to advertise the store.

X. Q. 45. Is that intended to carry the impression that these goods were manufactured at your store?

A. No, sir.

X. Q. 46. What is it intended to carry?

A. Simply where they are sold.

X. Q. 47. That they were sold at your store?

A. Yes, sir.

X. Q. 48. So that you could induce people to come back there and buy other goods?

A. Yes, that is about it.

X. Q. 49. Had you been selling any "Syrup of Figs" prior to the time that you bought these of Clinton E. Worden & Co.?

A. Well, the California "Syrup of Figs."

X. Q. 50. Had you been selling the California "Syrup of Figs"? A. Yes, sir.

X. Q. 51. That is the "Syrup of Figs" that is put up by the California Fig Syrup Co.? A. Yes, sir.

X. Q. 52. How long had you been selling that?

A. Oh, I don't know; for years.

X. Q. 53. Did you cease selling that after you commenced selling Clinton E. Worden & Co's.?

A. No, sir.

X. Q. 54. You carry both of them in stock, do you?

A. Yes, sir.

X. Q. 55. What was your object in carrying them both in stock?

A. Well, because there was more in one than there was in the other.

X. Q. 56. Which is the one that there is more in?

A. There was more in the Worden.

X. Q. 57. Do you mean more profit?

A. I mean more profit. Then there was another reason. People would come in and call occasionally for a

two-bit bottle of "Syrup of Figs," or "Fig Syrup"; the public had got to know that there a cheaper fig syrup on the market.

X. Q. 58. And they didn't want this expensive fig syrup?

A. No, they wanted a two-bit bottle occasionally.

X. Q. 59. And in justice to your customers who called for them you supplied your stock with the two-bit article?

A. Well, it was not that, really. It was the solicitation in the first place that induced me to buy it.

X. Q. 60. What induced you to buy it was the idea that you could get more money out of it, wasn't it?

A. No, the first inducement that made me buy it—I didn't know anything about it at all, at first—was the solicitation of their agent. I don't think I had ever heard that they had a "Syrup of Figs" until the man solicited me to buy it.

X. Q. 61. You say you received orders for two-bit bottles before that? A. I didn't say so.

X. Q. 62. You didn't say so a moment ago?

A. No, I think not.

X. Q. 63. Then you don't desire to say so now?

A. I don't desire to say so.

X. Q. 64. What you mean to say is that you had had calls for two-bit bottles, and that was one reason why you bought this "Syrup of Figs" of Clinton E. Worden & Co.?

A. I didn't say that before I had given any orders to Clinton E. Worden & Co. that I had had any calls for two-bit bottles.

X. Q. 65. You wanted to hedge a little on that proposition?

A. No; no, I don't want to hedge at all.

X. Q. 66. All right, then, get in that question now. You say you had orders for the two-bit article of "Syrup of Figs"? A. No, I didn't put it in that way.

X. Q. 67. What did you say?

A. I think I said I had calls.

X. Q. 68. Did you have the article in stock when you had calls for it?

A. I disremember, I could not say.

X. Q. 69. You don't remember anything at all about it? A. It is so long ago.

X. Q. 70. Isn't it the fact that you had calls for the two-bit article, and that you went out and got the article?

A. No, sir; that is not the fact.

X. Q. 71. The most natural supposition is that you went and got the two-bit bottles when you had calls for it, isn't it? A. No, I don't think so.

X. Q. 72. Did you go into the business of selling the "Fig Syrup" manufactured by Clinton E. Worden & Co. for any other purpose than to make a profit out of it?

A. Certainly not.

X. Q. 73. You found a reputable firm, a firm of standing in the community manufacturing an article out of which you could make a profit in the ordinary course of business, and you bought some of that stuff from them and sold it at a profit in the open market; that is about the fact, isn't it? A. That is about the fact.

X. Q. 74. There was no secret about the matter?

A. No, sir.

X. Q. 75. You didn't try to keep it secret from anybody? A. No, sir.

X. Q. 76. You had already heard, had you not, that there had been a suit over this "Syrup of Figs" manufactured by the California Fig Syrup Co.?

A. This man explained that the suit had been won; that they had a perfect right to sell this article.

X. Q. 77. So that you thought you had a perfect right to sell it? A. Yes, sir.

X. Q. 78. And that you were acting entirely within your rights in selling the article? A. Certainly.

X. Q. 79. You never for a moment had any idea that you were infringing upon anybody's rights?

A. No, sir.

X. Q. 80. Is that the general impression among druggists in regard to business?

(Objected to as incompetent, irrelevant and immaterial.)

A. Yes, sir.

X. Q. 81. When you found that suit had been brought against you, were you surprised at it in any respect?

A. Yes, sir.

X. Q. 82. In what way?

A. Well, I was not expecting it.

X. Q. 83. You didn't know that you had been doing anything for which you were liable to be sued?

A. No.

X. Q. 84. What did you do with the papers that were served on you? A. Kept them.

X. Q. 85. Did you speak to Clinton E. Worden & Co. about defending the suit?

A. I think not. I spoke, perhaps, with the agent as he came around. He told me that they were defending it.

X. Q. 86. He said the suit would be attended to?

A. Yes, sir.

X. Q. 87. You haven't paid anybody for defending it?

A. No, sir.

X. Q. 88. When you commenced to speak of this "Syrup of Figs" manufactured by Clinton E. Worden & Co. I understood you to say that you were selling that article and the article manufactured by the California Fig Syrup Co. at the same time?

A. Yes, sir; after I bought from Worden.

X. Q. 89. Now, sometimes you had a call for the two-bit article, and then you sold Worden's?

A. Yes, sir.

X. Q. 90. When you had a call for the other article, then you sold the other?

A. Yes, when I had a call for "Syrup of Figs," the California Syrup of Figs," I sold it.

X. Q. 91. On what occasion would you sell the other?

A. I kept the bottles on my showcase as I keep a great many bottles of my own manufacture on my showcase, where everybody comes in, and, if people make any inquiry about it, or ask for it, I sell it to them; otherwise I don't.

X. Q. 92. You never tried to pass off that for the other, did you? A. No, sir; I never did.

X. Q. 93. You were entirely fair, open and above board with your customers in that regard? A. Yes, I was.

X. Q. 94. Could you truthfully say that you did not deceive any of your customers by trying to pass off one for the other? A. Yes, sir.

X. Q. 95. They could take their choice, whatever they liked? A. Yes.

X. Q. 96. That was about the substance of it, was it?

A. Yes, sir.

X. Q. 97. Did you find any difference between these two articles? A. Well, I never tested them.

X. Q. 98. You assumed that one was as good as the other, so far as the medicine was concerned?

A. No, I don't think I assumed anything about it.

X. Q. 99. You were simply selling it, then, to make more profit out of it than you could out of the other?

A. Yes, sir.

X. Q. 100. You didn't know whether one was superior to the other, did you?

A. No, so far as that was concerned I didn't know one was superior to the other.

X. Q. 101. As long as people came there, and were willing to buy what you had to sell you would sell it to them and make a profit out of it?

A. That is the usual way of doing business.

X. Q. 102. Did you sell the entire dozen bottles that you bought from Worden? A. I think so.

X. Q. 103. You only bought one batch from him?

A. I could not say how many I bought.

X. Q. 104. I understood you to say that your impression was that you bought one dozen.

A. At that time; I may have bought some later; in fact, I know that at the time these papers were served

on me I had just bought, just got some in, and I returned it.

X. Q. 105. You have not bought any since, have you?

A. No.

X. Q. 106. What have you been selling since the suit was brought?

A. The California Fig Syrup Co.'s preparation.

X. Q. 107. You have been buying it from the complainants in this case, have you?

A. I have been buying it from wholesale houses.

X. Q. 108. What wholesale house have you bought it from? A. Mack & Co., Langley, Michaels & Co., and—

X. Q. 109. Do you receive any calls now for the two-bit article? A. Well, I don't think I do.

X. Q. 110. Do you keep any of this other article in the showcase now, or has it been removed?

A. Which other article?

X. Q. 111. Worden's "Syrup of Figs."

A. No, no; I don't keep it now.

X. Q. 112. Do you know what is the formula of the California Fig Syrup Co.'s medicine? A. No, sir.

X. Q. 113. Do you know what is the formula of the Worden? A. No, sir.

X. Q. 114. Were you subpoenaed to come down here and tesify? A. I was.

X. Q. 115. By whom were you subpoenaed?

A. I don't know.

X. Q. 116. Some one served you with a paper to come?

A. Yes, sir.

X. Q. 117. Have you talked with anyone connected

with the California Fig Syrup Co. since this suit was commenced? A. Since when?

X. Q. 118. Since this suit was commenced?

A. I don't know the year that this suit was commenced. Is this the suit that was commenced a year ago? Yes.

X. Q. 119. With whom did you talk?

A. A gentleman who was in attendance here.

X. Q. 120. Mr. Richard E. Queen, is he the one?

A. Yes, that is the gentleman.

X. Q. 121. Where did you have a talk with him?

A. In the store.

X. Q. 122. When was it? A. Well, I don't know.

X. Q. 123. What was the conversation that you had with him?

A. The conversation was about like this; whether I had ordered the name "San Diego Fig Syrup" put on this package?

X. Q. 124. You told him, I presume, substantially what you have stated here? A. Yes, sir.

X. Q. 125. What did he say then?

A. He didn't say much.

X. Q. 126. Did anything else occur?

A. Nothing else.

X. Q. 127. Nothing at all?

A. Not that I remember of, any more than he may have—let me see, I can think of something more of the same conversation. I think he told me at that time that Clinton E. Worden had testified that that was put on there entirely at my solicitation. I think he told me that.

X. Q. 128. Anything else?

A. Not that I remember.

X. Q. 129. That is substantially the conversation that occurred? A. Yes, sir.

X. Q. 130. What did he say to you afterward, about your testifying?

A. I think he said that they would subpoena me to appear before the Court.

X. Q. 131. Did you say that you would come?

A. Why, certainly; if I received a subpoena.

X. Q. 132. Of course, you would come if you received a subpoena, but what I ask you is, did you tell him that you would come if he wanted you? A. No, sir.

X. Q. 133. When did you come?

A. About half-past twelve o'clock today.

X. Q. 134. When did you buy any goods of the California Fig Syrup Co. last? A. I could not tell you.

X. Q. 135. Did Mr. Queen say anything to you about selling any of this stuff? A. No, sir.

X. Q. 136. Have any of the agents of the California Fig Syrup Co. called on you? A. No, sir.

X. Q. 137. Which agents did you get it from?

A. From a wholesale house.

X. Q. 138. Which wholesale house?

A. From different wholesale houses, once or twice a week; whenever I am in need of it; the first man that comes up gets the order.

X. Q. 139. Now, this Exhibit "D," which I now hand you, is one, I believe, which you say is one of the packages put up by Clinton E. Worden & Co., and sold by you as you have testified to?

A. Yes, as near as I can recollect.

X. Q. 140. Now, what idea was intended to be conveyed by the use of these words on that wrapper, "Syrup of Figs"? A. I could not tell you.

X. Q. 141. You understand the English language, do you not? A. Yes, sir.

X. Q. 142. You are American-born, are you?

A. Yes, sir.

X. Q. 143. What does the word "Syrup of Figs" mean? That is, what impression does it carry to the mind when used for the first time?

A. You ask me what it was intended to convey?

X. Q. 144. I ask you what the impression would be that would be carried to the mind by the word for the first time? A. That it was "Syrup of Figs."

X. Q. 145. When did you first hear of it?

A. Oh, I could not tell you.

X. Q. 146. Now, when people come into your store, or into any other store, and buy an article called "Syrup of Figs," do you know what ideas they have with regard to he constituents of that medicine, so far as figs are concerned? A. No, sir; I do not.

X. Q. 147. Notice the context of this label, Exhibit "D"; it says that it is a "combination of harmless and efficient substances combined with the delicious laxative juices of the best Smyrna figs." Now, was that put on there for the purpose of showing that figs enter into its composition? A. I would suppose so.

Mr. OLNEY.—I move to strike out the witness' answer that he supposed so, as irrelevant and immaterial. It is not a question of opinion at all.

X. Q. 148. (By Mr. MILLER.)—Can you give any reason why it would be desirable in making a salable medicine of this kind to put on the label a statement to the effect that it contains figs in some form or other, rather than any other syrup?

A. I don't think I quite catch your question.

X. Q. 149. Well, I will put it in this way then. I presume that you are aware of the popular impression that has prevailed for a long time to the effect that figs are laxative in some way, are you not? A. Yes, sir.

X. Q. 150. The public have that idea, or a great many of the public have that idea, have they not?

A. Yes, sir.

X. Q. 151. Now, would that make a medicine salable as a laxative or not, that it contains, or had a statement that it contains, figs in some form or other?

A. I think it would.

X. Q. 152. How long have you known of this popular impression regarding the supposed laxative quality of figs?

A. Oh, I don't know; I have no idea when I first got the idea.

X. Q. 153. But as a druggist you have observed that impression amongst people, have you not?

A. I don't know that I have particularly; I don't know that I have. I can't recollect anybody ever talking with me about the laxative quality of figs.

X. Q. 154. You know of that popular impression existing, do you?

A. Yes, I know that there is such an impression.

X. Q. 155. But you mean now that you don't remember any individual case where a person spoke to you about it? A. No.

X. Q. 156. You are a druggist, and have had long experience in selling medicine and things of that kind to the public, and I will ask you this question; if this bottle, this package, Exhibit "D," were to be in a drugstore in open view where anybody could see it, and a person should come in who wanted a laxative, and he had never heard of "Syrup of Figs" as a laxative, and if he were to see this label with the name on it, "Syrup of Figs," having the impression that figs were a laxative, now what impression would be conveyed to his mind by the use of these words, "Syrup of Figs," so far as the laxative qualities of the medicine are concerned?

(Objected to as incompetent, irrelevant and immaterial, and on the further ground that it is impossible for the witness to say what would be in anybody else's mind.)

A. You want to know what the impression would be?

X. Q. 157. I want to know from your experience as a druggist of long standing in selling medicines of this and other kinds to the public at large, men, women and boys, for instance, when they come into your store to ask for a laxative medicine, wanting a laxative medicine, when they see this bottle upon your shelf with the words "Syrup of Figs" on it, and when they know or have an idea that figs are laxative, now, from your experience, what would be the impression that would be conveyed to the mind of such people from seeing that name?

A. That it would be a good laxative medicine.

X. Q. 158. That is the most natural conclusion that a person would come to, is it not?

(The same objection; also on the ground that this witness cannot state what was in the mind of other people. No answer.)

X. Q. 159. Now, I show you complainant's Exhibit "E," and ask you if you recognize that as a package of the complainant's? A. Yes, sir.

X. Q. 160. You notice the words "Syrup of Figs" on that, do you? A. Yes, sir.

X. Q. 161. And also notice the words "California Fig Syrup Co.," do you not? A. Yes, sir.

X. Q. 162. You also notice the branch of figs, do you not? A. Yes, sir.

X. Q. 163. And you also notice the figtree, and the young lady holding the branch of figs, on each end of the box, do you not? A. Yes, sir.

X. Q. 164. Now, if a person should come into your store and want a laxative medicine, and were to see this package, having the idea that figs in general were laxative, what impression would be conveyed to his mind as to the use of these words, "Syrup of Figs," as far as your experience goes as a druggist in selling medicine of that kind to the public at large?

(Objected to as incompetent, irrelevant and immaterial, and calling for an opinion of the witness, and calling for the witness to make a statement as to the mental operations of other people.)

A. I think it would be favorable. I think they would think favorable of the medicine.

X. Q. 165. As a laxative?

A. As a laxative, yes.

X. Q. 166. Isn't it the fact that a majority of the people buy medicine more on faith than on any actual knowledge of their constituents?

(The same objection.)

A. Well, I could not say as to that.

X. Q. 167. Has it not very frequently been that a person comes into your store and says he has such and such an ailment, and says, "Give me a remedy for it?" Isn't that a fact? A. Yes, very often.

X. Q. 168. And you knowing the remedy for that particular case, put out a bottle, or whatever form it is, sell it to him and tell him that it is a good remedy; isn't that the fact? A. Yes, sir.

X. Q. 169. And he takes it, and is satisfied with it?

A. Well, he takes it.

X. Q. 170. It may be good, or it may not be good?

A. Yes, sir.

X. Q. 171. That can only be determined after he takes it? A. Yes, sir.

X. Q. 172. But that illustrates the manner in which people call for medicines very frequently. It goes to show that it is a matter of faith, does it not?

A. Yes, I think so.

Redirect Examination.

(By Mr. OLNEY.)

R. Q. 1. How long have you known the complainant's medicine, "Fig Syrup," or "Syrup of Figs?"

A. Well, I don't know.

R. Q. 2. It is a long while, isn't it?

A. Yes, it is a long while.

R. Q. 3. What is the proper name of that medicine?

A. "Syrup of Figs."

R. Q. 4. Well, call it "Syrup of Figs." When the name "Syrup of Figs" is used, what does the trade understand it to refer to?

A. California "Syrup of Figs," I think.

Recross Examination.

(By Mr. MILLER.)

R. X. Q. 1. Now, when you were selling the Worden "Syrup of Figs." I understand you to say that you never tried to pass it off for the other stuff?

A. That is right.

R. X. Q. 2. You sold it openly and above board, did you? A. Yes, sir.

R. X. Q. 3. Now, when people came in and called for that article, what name did they call for?

A. Called for which article?

R. X. Q. 4. The "Syrup of Figs" that you sold.

A. I don't know. I think what I sold was sold from just standing on the counter and them seeing it, or that they would come in and ask specially.

R. X. Q. 5. What did they say on these occasions?

A. I don't remember.

R. X. Q. 6. Did they see the name "Syrup of Figs" on the label? A. Yes, sir.

R. X. Q. 7. Is that the way of it? Is that the way all

of your stuff was sold, in individual instances like that?

A. All what stuff?

R. X. Q. 8. The "Syrup of Figs" that was put up by Worden?

A. I don't remember how every individual bottle was sold. I could not tell you that.

R. X. Q. 9. Did you ever sell any of the Worden article out of the city, send it away on orders anywhere?

A. I think not.

R. X. Q. 10. Did you ever send any of the California "Syrup of Figs" article out of the city?

A. I don't think so.

R. X. Q. 11. Yours is a transient retail trade, isn't it?

A. Yes, sir.

R. X. Q. 12. Did you ever sell any more than one bottle at a time? A. I could not say.

R. X. Q. 13. Now, how would you know the difference between these two articles when people would come in? How would you know which one they wanted?

A. Well, I don't think I could exactly tell you. If they asked for California "Syrup of Figs," they got it. I never tried to sell them, any more than just leaving it sit on my showcase; if they came along and seen it and wanted it, they got it; if they didn't, they did not.

R. X. Q. 14. When they called for the California "Syrup of Figs" you sold them California "Syrup of Figs?" A. Yes, sir.

R. X. Q. 15. And when they called for the other article you sold them the other article? A. Yes, sir.

R. X. Q. 16. Now, when they called for that Worden article, what did they name it?

A. I suppose they asked for a two-bit bottle.

R. X. Q. 17. You don't remember about that?

A. I don't remember, but I think that was about the way of it.

Examination in chief of

TRUMAN F. BACON, a witness called on behalf of complainant; sworn.

(By Mr. OLNEY.)

Q. 1. What is your full name?

A. Truman F. Bacon.

Q. 2. What is your age? A. Sixty-three.

Q. 3. And your occupation?

A. Druggist and physician.

Q. 4. Where is your place of business?

A. Corner of Gough and Hayes streets.

Q. 5. What is the name of the drugstore in which you do business?

A. I call it the Ariel Pharmacy. I was formerly at 510 Hayes street.

Q. 6. That is the name of your drugstore, is it, the Ariel Pharmacy? A. The Ariel Pharmacy.

Q. 7. Have you been acquainted with a medicine on the market put up by the California Fig Syrup Co. called "Syrup of Figs?" A. I have.

Q. 8. How long have you been acquainted with that medicine?

A. Well, that would be hard to say. I have only been in business a little over eight years; well, nine years.

I knew it, of course, before I went into business, but I could not tell you how long before.

Q. 9. Were you ever at any time solicited by an agent of Clinton E. Worden & Co. to sell an imitation medicine —to buy an imitation medicine? A. I was.

Q. 10. Did you make any purchase from Clinton E. Worden & Co.? A. I did.

Q. 11. Was any suggestion made to you as to the name that should be put upon the bottle?

A. He showed me the carton.

Q. 12. They showed you the carton?

A. Yes, as to the place where it was made.

Q. 13. I show you complainant's Exhibit "H," indorsed "May 11, 1897, R. E. Q.," and ask you if the preparation you purchased from Clinton E. Worden & Co. is like that? A. Yes, that is my mark. (Pointing.)

Q. 15. Then this exhibit (H) has a mark on it?

A. Yes, sir.

Q. 16. This exhibit "H" was purchased by you from Clinton E. Worden & Co.? A. Yes, sir.

Q. 17. How did the name "New York Fig Syrup Co." at the bottom of the carton come to be there, do you know?

A. Well, they had a number of names on the imprint; I don't remember; there were a number of them, and I chose that as being as good as any other. That is all I can say.

Q. 18. Was there any statement made to you at the time about your right to sell this article?

A. Yes, sir.

Q. 19. What was the statement?

A. Well, to the effect that the California Fig Syrup Co. had been beaten in their suit, and that any one had a right to put up medicine of the same sort, and use that name. When I suggested that there might be some trouble, the salesman said that I would be protected if there was any trouble, that they would assume the responsibility.

Q. 20. You are one of the defendants in this suit, are you not? A. Yes, sir.

Q. 21. Did you employ counsel to defend you?

A. I did not.

Q. 22. Did you make any statement to Clinton E. Worden & Co., or their representative, in regard to the suit, that suit had been brought against you?

A. Well, I don't know; he was in every week, and I asked about the suit.

Q. 23. Well, what did he say?

A. Why, he told me the suit had been brought.

Q. 24. Was anything said about his defending the suit for you? Protecting you?

A. Not that I remember specially; that was understood at the first.

Q. 25. You have not yourself employed attorneys in the case? A. No, sir.

Q. 26. You have paid no attention to it? A. No.

Q. 27. What price did you pay for this medicine?

A. Well, it was a little over two dollars a dozen. I don't remember now exactly.

Q. 28. What do you sell it for? What do you retail it at? A. Two bits.

Q. 29. Was any statement made to you in regard to other druggists who were selling this medicine, and the statement made as an inducement to you to purchase?

A. Yes, sir.

Q. 30. What was it?

A. Well, the salesman showed me a list of a number who bought it and were selling it.

Q. 31. Well, it was represented to you then that other druggists were selling it? A. Yes, sir.

Q. 32. And that was in connection with a solicitation for you to buy? A. Yes, certainly.

Cross-Examination.

(By Mr. MILLER.)

X. Q. 1. What is the name of this agent from Clinton E. Worden & Co. who called on you in regard to this matter? A. His name is Gray.

X. Q. 2. That is the same one who was mentioned by the last witness, is it not?

A. Well, I wasn't here at the beginning of his testimony.

X. Q. 3. Did you hear the testimony of Mr. Bright, who was a witness on the stand?

A. I only heard a part of it; I didn't hear the first of it.

X. Q. 4. Did this agent sell you any goods of any kind but this? A. Oh, yes.

X. Q. 5. What kind of goods did he sell you?

A. Oh, various goods.

X. Q. 6. Such articles as would be manufactured by Clinton E. Worden & Co., I presume?

A. Yes, sir.

X. Q. 7. You had been in the habit of buying articles from him, had you? A. Yes, sir.

X. Q. 8. How often had he been in the habit of calling on you for orders? A. As a rule, twice a week.

X. Q. 9. He came around in the regular course of business and asked whether you were in need of any of such and such an article, and if not whether you wanted anything else, any more goods? That would be about the way of it? A. Yes, sir.

X. Q. 10. You were one of his regular customers, were you not? A. Yes, sir.

X. Q. 11. Now, when was it that you bought this first package of "Syrup of Figs" from Clinton E. Worden & Co? A. That I could not tell you.

X. Q. 12. How much did you buy?

A. If I remember, I bought half a gross, if I remember rightly.

X. Q. 13. You only made one purchase, did you?

A. I only made one purchase.

X. Q. 14. And that you think was half a gross?

A. Yes, sir.

X. Q. 15. The agent came around and told you that there had been a suit about this name in the East and that the California Fig Syrup Co. had lost the suit, and the Court had decided that it did not have any exclusive right to that name? A. Yes, sir.

X. Q. 16. Did he? A. Yes, sir.

X. Q. 17. And that, therefore, other druggists had the right to use that name, "Syrup of Figs," did he not?

A. Yes, sir.

X. Q. 18. And he suggested that he put up some of the medicine for you, and that you undertake to sell it?

A. Yes, sir.

X. Q. 19. There was nothing secret or underhanded about it, was there? A. Nothing at all.

X. Q. 20. Everything was open and above board, was it? A. Yes, sir.

X. Q. 21. You believed what he said in relation to this matter, did you? A. Certainly.

X. Q. 22. And you concluded that you could make some money by following his suggestion?

A. Yes, certainly.

X. Q. 23. Therefore you ordered some of the medicine from him? A. Certainly.

X. Q. 24. That was in the same way that you would order any other medicine? A. Certainly.

X. Q. 25. Now, then, in regard to this name, I believe you testified, didn't you, that this name appearing on the label "New York Fig Syrup Co." was a good enough name for the medicine? A. Yes, sir.

X. Q. 26. Well, now, what was it that made you think that this particular name was proper for it?

A. Well, only this, that you know, as the saying goes, "Distance lends enchantment," and a good many people think that an article from a distance is better than coming from right at home.

X. Q. 27. It was that that induced you to select this name as being a proper one, was it? A. Yes, sir.

X. Q. 28. And you then instructed them to put that in the imprint on the labels? A. Yes, sir.

X. Q. 29. And it was done in pursuance of that?

A. Exactly.

X. Q. 30. It is a common practice among druggists, isn't it, to select names that way in order to make an article salable? A. Yes, sir.

X. Q. 31. In fact, in the drug business, you have to appeal to all kinds of whims and notions of customers?

A. Most assuredly.

X. Q. 32. They take medicine as a matter of faith, do they not?

A. No, not as a matter of faith; they take it on recommendation and advice, and as a matter of reputation.

X. Q. 33. What I mean is, they do not understand what the constituents are?

A. Of course not.

X. Q. 34. They take it on the representation of other people or on a prescription of their physician and in that way I mean that they take it as a matter of faith. That is about the fact, isn't it?

A. Well, yes; call it faith, if you choose.

X. Q. 35. As a matter of confidence in other people?

A. That is, confidence in what others say. Others say "I have used it and find it good," and they try it.

X. Q. 36. And they do it without knowing what the actual constituents are, do they? A. Yes, sir.

X. Q. 37. Now, when you bought this medicine from Clinton E. Worden & Co., what did you proceed to do with it? A. Why, I exposed it for sale.

X. Q. 38. Put it up in your store in open public view?

A. Yes, put some of it in my show window.

X. Q. 39. Did you have any calls for it?

A. Yes, sir.

X. Q. 40. You sold some of it? A. Yes, sir.

X. Q. 41. At two-bits a bottle?

A. At two-bits a bottle.

X. Q. 42. How did people call for it?

A. "Syrup of Figs," and I would sell that whenever I could.

X. Q. 43. You were selling the other article also at the same time? A. Yes, sir.

X. Q. 44. Which one did you sell the most of?

A. I sold the most of the California Fig Syrup Co.

X. Q. 45. Did you ever try to pass the Worden syrup off as the California Fig Syrup Co.'s production?

A. No, sir.

X. Q. 46. You never deceived anyone in that regard?

A. No, sir.

X. Q. 47. So that none of your customers who bought this Worden Fig Syrup from you were deceived into buying it, supposing that it was the other article?

A. No, sir.

X. Q. 48. It was a matter of choice which they would take? A. Yes, sir.

X. Q. 49. If they wanted a two-bit bottle they got the Worden, and if they wanted a four-bit bottle they got the other, did they? A. Yes, sir.

X. Q. 50. Are you aware of a general public impression that exists among people that figs have some kind of laxative qualities? A. Yes, sir.

X. Q. 51. How long have you known of that impression? A. A good many years.

X. Q. 52. It is quite a common impression among people generally? A. Certainly.

X. Q. 53. Now, with people who have that impression, what would be the natural conclusion they would arrive at concerning the constituents of a medicine if they should see the bottle labeled "Syrup of Figs" with the statement on it that it was a laxative medicine?

(Objected to as incompetent, irrelevant and immaterial, calling for a statement of the winess and in no sense proper testimony.)

Mr. MILLER.—I withdraw the question.

X. Q. 54. Now, Mr. Bacon, you are a druggist of long standing and I presume have had large dealings, extensive dealings with people who come in to buy medicine at your drugstore, men, women and boys?

A. Yes, sir.

X. Q. 55. And you know pretty well about the way people of that kind do when they come in to buy medicine. Now, if a person were to come into your store and wanted a laxative medicine and you knew he had the impression that figs were laxative in some way or other, and he should see a bottle of laxative medicine labeled "Fig Syrup" or "Syrup of Figs," with the statement on it that it was a laxative, now from your experience in that line what would be the impression that would be conveyed to the mind of that person by seeing that name upon that label?

(Objected to as incompetent, irrelevant and immaterial, in no sense, no proper sense, testimony, legal testimony

in this case, and calling for a conclusion of the witness, not a statement of facts.)

A. Well, the impression, of course, would be that it is a laxative medicine.

X. Q. 56. Would the name "Syrup of Figs" have anything to do with creating that impression on his mind?

(Objected to as incompetent testimony; not legal in any way, shape or form.)

A. Well, the use of that name would certainly convey the impression that it was a laxative medicine.

X. Q. 57. When do you first remember of hearing this name "Syrup of Figs"?

A. Well, I could not tell you now; it is a long time ago.

X. Q. 58. When you first heard of it what did you suppose the constituents of the medicine were judging from the name?

(Objected to as incompetent, irrelevant and immaterial.)

A. I don't know as I ever thought of the name specially. I knew, of course, the laxative quality of figs was very little, figs being only slightly laxative, and that other medicines have to be compounded with them to make it of much value as a laxative.

X. Q. 59. Suppose you were to see a bottle labeled in big letters "Syrup of Strawberry," what would be the natural impression conveyed to your mind as to the constituents of that medicine?

A. Well, naturally I would think, of course, it would be what the name indicated.

X. Q. 60. The object of the label is to indicate what is inside of the bottle, isn't it? A. Certainly.

X. Q. 61. Now, when you see the name, when you first see the name "Syrup of Figs" on a bottle would you not have that same impression arising that there was syrup inside of the bottle made from figs?

A. Certainly, I would.

X. Q. 62. That would be the natural conclusion, that opinion would come from seeing it, wouldn't it?

(The same objection, also, as incompetent, irrelevant and immaterial.)

A. Certainly.

X. Q. 63. That would be about on the same principle as if you saw a barrel labeled barrel of flour, you would suppose that it contained flour? A. Yes, sir.

X. Q. 64. Did you notice any difference in quality between the Fig Syrup made by the Clinton E. Worden Co. and that made by the California Fig Syrup Co.?

A. I never opened a bottle of "Syrup of Figs" made by the California Fig Syrup Co. I sold it just as it was.

X. Q. 65. I suppose you presumed that the Worden article was a good article, did you not, from the packages you sold? A. Yes, sir.

X. Q. 66. It was made by a reputable house, was it not? A. Yes, sir.

X. Q. 67. But as to its actual constituents, that you don't know of your own knowledge? A. No, sir.

Redirect Examination.

(By Mr. OLNEY.)

R. Q. 1. I believe you said you did not know how long you had known of this medicine put up by the California Fig Syrup Co.? A. No, sir.

R. Q. 2. You do know, however, do you not, that when the term "Syrup of Figs" is used, or "Fig Syrup," it is understood in the trade to refer to their medicine? Do you not know that? A. Yes, sir.

R. Q. 3. For instance, if you wish to order any of the complainant's medicine you would simply order "Syrup of Figs," or "Fig Syrup"? A. Certainly.

R. Q. 4. This is understood in the trade?

A. Certainly.

R. Q. 5. And the reputation of this medicine is good in the community, is it not? A. Yes, sir.

R. Q. 6. Therefore, if a medicine bears the name "Syrup of Figs" it is more likely to sell, is it not, just for that reason?

A. Certainly; the advertising of it has created a demand for it.

R. Q. 7. And if any other medicine is sold under that name, the purchaser, the people who want laxative medicines, would be induced to buy just because of the good reputation of the complainant's medicine?

A. Yes, sir.

R. Q. 10. Now, when customers called for "Syrup of Figs," if you gave them the medicine that you bought from Mr. Worden they would take it, would they?

A. They would.

R. Q. 11. Suppose they made an objection and asked if it was the genuine "Syrup of Figs," what did you do then?

A. I told them the truth about it; that it was an imitation.

R. Q. 12. If they did not ask any questions at all you sold them the medicine and let them take it away without any explanation?

A. No, I would show them the bottle that I was selling at thirty-five cents. That was what it retailed at; there was no profit on it at all; where the other retailed at twenty-five cents.

R. Q. 13. One bottle retailed at thirty-five cents and the other at twenty-five cents? A. Yes, sir.

R. Q. 14. Would you make any other representations to them?

A. Sometimes I would say that this is a good medicine, recommend it.

Examination of

RICHARD E. QUEEN, recalled on behalf of complainants.

(By Mr. OLNEY.)

Q. 1. Mr. Queen, counsel for the defendant asked you to produce an advertisement here; have you that advertisement that he asked you to produce?

A. Yes, I have. It has been in evidence.

Q. 2. Now, have you any advertisement that has been running through the papers extensively during the last year? A. I have.

Q. 3. Is this one of them which I show you?

A. Yes, it is an advertisement that has been alternating for the past year with other advertisements.

Mr. OLNEY.—We offer this in evidence. It is one page of the Cleveland Press, published at Cleveland, Ohio, under date of Tuesday, April 12, 1898.

(Marked "Complainant's Exhibit W.")

Q. 4. I ask you if this is a sample of the advertisements that you were publishing extensively at that time?

A. Yes, sir.

Cross-Examination.

(By Mr. MILLER.)

X. Q. 1. This is the same thing that is in the "Examiner" and others papers, isn't it? A. Yes, sir.

X. Q. 2. Have you any advertisements of your medicine in which it is not stated or mentioned that senna is its active constituent?

A. Yes, sir. That you have already introduced in evidence.

X. Q. 3. Which papers were they published in?

A. Well, they were published in a number of papers.

X. Q. 4. What character of papers?

A. Newspapers; daily newspapers.

X. Q. 5. Daily newspapers? A. Yes, sir.

X. Q. 6. Now, here is an advertisement that has been offered in evidence, marked "Respondent's Exhibit No. 13," from the Reno "Evening Gazette," of November 19, 1898. That does not mention the fact that your medicine contained senna, does it? A. It does not.

X. Q. 7. Now, tell me what papers that was published in.

A. This was published in the daily and weekly newspapers.

X. Q. 8. In how many of them?

A. Well, a great many; I don't remember the number.

X. Q. 9. In what parts of the country?

A. Pretty much all over the United States, I think.

X. Q. 10. In pretty nearly every State in the Union?

A. I think so.

X. Q. 11. In fact, you are great advertisers, are you not? A. We are.

X. Q. 12. Did you publish that in any other papers outside of the daily papers that you have referred to?

A. Particularly the daily and weekly newspapers.

X. Q. 13. Did you publish it in "Harper's Weekly"?

A. No, I don't think we ever published that same advertisement in "Harper's Weekly."

X. Q. 14. I hand you an advertisement now and ask you if it is not an advertisement that is published in "Harper's Bazaar"?

A. Yes, this has been published in "Harper's Bazaar."

X. Q. 15. It is being published in that, is it not?

A. It has been published since the first of the year. I was speaking at first of last year.

X. Q. 16. In what other papers are you publishing this?

A. Well, in a great many magazines and newspapers; daily and weekly newspapers.

X. Q. 17. All over the United States?

A. Yes, sir.

X. Q. 18. In practically every State in the Union?

A. I think so.

X. Q. 19. How much do you say you spend annually in advertising this medicine, in rough numbers?

A. It varies; say from two hundred thousand dollars to three hundred thousand dollars per annum.

X. Q. 20. Why is it that you don't mention in this advertisement from "Harper's Bazaar" that senna is the active principle of your medicine?

A. Well, we change our advertisements. In some we mention it and in some we do not.

X. Q. 21. You don't mention that fact in these popular newspapers such as those that have been put in evidence here. (Showing an advertisement of the kind where it is not mentioned.)

A. Yes, we do at certain times.

X. Q. 22. At what times?

A. Well, maybe during one month or during two months, we run one of the above advertisements and then drop it and publish another advertisement, and in that way we endeavor to publish a statement in nearly all the leading newspapers of the United Sates. We endeavor to advertise in all sections of the United States that the laxative principles are obtained from senna, but we don't publish this statement all the year round; we publish them only certain weeks or certain months of the year.

X. Q. 24. What is the objection to stating in all of your advertisements that senna is the active principle?

A. I have no objection to making this statement, but space is necessarily limited and sometimes I devote all of the space to the statement of the effects of the remedy,

and in another advertisement I devote all the space to a statement of the composition of the remedy.

X. Q. 24. Why, would you make that distinction in the two styles of advertisement is what I want to get at?

A. Well, it is difficult to state it all at one time. You can't crowd so many statements into so small a space.

X. Q. 25. So, it was on account of the scarcity of space in the advertisement that you failed to state that the active constituent is senna in these instances where you have failed to make that statement, is it?

A. There may be space enough in which to make the statement, but I can't make all the statements that I wish to make on the subject at one time.

X. Q. 26. It takes only about three lines to make that statement, according to this advertisement, does it not?

A. There are from five to six or more lines devoted to it in this advertisement.

X. Q. 27. Read that part of it which is devoted to it in that advertisement, and that part only.

A. You wish the whole sentence read, do you?

X. Q. 28. Yes, sir.

A. (Reading). "When one learns of the qualities which commend an article to general favor, valuable information is acquired, and in recognition of the facts the California Fig Syrup Co. has continuously published for many years past that it obtains by a method of its own the medicinal laxative virtues of the choicest selections of senna, and combines that with an excellent combination of aromatic carminatives to form the pleasant and effective family remedy 'Syrup of Figs.' This remedy is so well and favorably known and has given such univer-

sal satisfaction throughout the world that it is interesting to know the above facts, and also the statement which they make and have always made, that the medicinal virtues and distinctive flavoring of the remedy are obtained from plants and not from figs, as figs are simply a food and only a very small quantity of the juice of the figs is used in the combination to form a pleasant taste, simply as one adds a little sugar to coffee or tea, not to give strength or flavoring to the coffee or tea, but to make it more palatable, and with this difference, that coffee and tea are used as pleasant beverages, while the "Syrup of Figs' manufactured by the California Fig Syrup Co. is a most excellent medicinal laxative and always sold and used as such."

X. Q. 29. Now, what paper is that advertisement in?

A. The Cleveland (Ohio) "Press."

X. Q. 30. Of what date?

A. It is dated April 12, 1898.

X. Q. 31. Was that the first insertion of it?

A. No, I think not.

X. Q. 32. When was the first insertion of it?

A. Early in 1898.

X. Q. 33. Is it running in that paper now?

A. It is; I do not mean to state that it is running this very day, but I mean from day to day.

X. Q. 34. Now, I will show you another one of these advertisements, complainant's Exhibit "C," from the Cleveland "Leader," February 1, 1896, and ask you if there is any lack of space in that advertisement where you could insert the statement that the active ingredient of your medicine is senna?

A. There is plenty of space there in which you could make that statement.

X. Q. 35. You did make that statement in your advertisement from the "Evening Post," Louisville, Kentucky, April 22, 1896, complainant's Exhibit "C," did you not?

A. I did.

X. Q. 36. There was no lack of space there, was there?

A. There was not.

Mr. MILLER.—We offer in evidence the advertisement which has been produced by the witness as being published in "Harper's Bazaar," Jan. 7, 1899, and ask that it be marked "Respondent's Exhibit No. 19."

(Marked Respondent's Exhibit No. 19.")

(Further hearing continued subject to notice.)

Saturday, March 1, 1899, 11 A. M.

Counsel appearing:

For complainant, Warren Olney, Esq.

For respondent, Purcell Rowe, Esq.

Examination in chief of

WASHINGTON DODGE, M. D., a witness called on behalf of respondent; sworn.

(Mr. ROWE.)

Q. 1. Doctor, will you give your name, age, residence, and occupation?

A. Washington Dodge; thirty-nine years of age; physician and surgeon by occupation; residence, 1714 Van Ness avenue, San Francisco.

Q. 2. Doctor, have you occupied any official position in regard to your professional work?

A. I hold the position of professor of therapeutics in the Medical Department of the State University.

Q. 3. Doctor, I show you a paper purporting to be an analysis of a preparation called "Syrup of Figs," and I will ask you, doctor, in looking over that, do you find any ingredient that has any cathartic action?

A. Yes, sir.

Q. 4. What is it, doctor?

A. Extract of senna.

Q. 5. Is there any ingredient there that you know that has any cathartic action other than the senna?

A. No, sir.

Q. 6. I will ask you, doctor, if senna will permanently cure habitual constipation?

(Objected to as incompetent, irrelevant, and immaterial, and on the further ground that it is a matter that has been gone over very fully in a previous examination.)

A. It is not a drug that, in my experience, will do so, nor have I ever seen any authority that claimed that.

Q. 8. Your duties, doctor, as professor, holding the chair of therapeutics, would bring you into contact, would they not; with all of the medical authorities that would bear upon the subject, the therapeutical properties of senna?

A. I could not say that it would with all of them.

Q. 9. I mean the standard authorities.

A. I am supposed to be familiar with the standard authorities as to the action of drugs.

Q. 10. And you are basing your answer, the foregoing answer, that you have made, both upon your experience and upon your knowledge derived from the authorities, are you not? A. Yes, sir.

Q. 11. I will ask you further, doctor, is there any ingredient that you see there that will permanently cure habitual constipation?

A. I make the same answer. I see no ingredient that in my experience would lead me to suppose would have any such action, nor is there any ingredient that I have ever seen that claim made for by any authority.

Q. 12. Then if neither senna or any other ingredient, doctor, would permanently cure habitual constipation, would they, in combination with the various ingredients, bring about, in your judgment, a permanent cure of habitual constipation?

A. They would not, in my judgment.

Q. 13. Then a preparation compounded from those various ingredients, whatever it might be, would not permanently cure habitual constipation?

A. No, sir; not in my judgment.

Q. 14. I will ask you whether or not, in your judgment, senna will aggravate constipation?

A. As far as my experience goes, I believe that it does; I would say when used habitually.

Q. 15. Then, supposing the active cathartic principle being there, if that answer is true, it would reasonably follow, would it not, that any preparation or the preparation compounded from the ingredients which you hold in your hand would have a tendency to aggravate constipation if used in the same way as senna, would it not?

A. Yes, I think that is a logical conclusion.

Q. 16. Doctor, have you ever prescribed the laxative know as "Syrup of Figs"? A. No, sir.

Q. 17. You know of such a laxative preparation, do you not? A. Yes, sir.

Q. 18. Do you consider it a standard preparation such as you would prescribe in your practice?

(Objected to as incompetent, irrelevant, and immaterial.)

A. No.

Q. 19. Why not, doctor?

A. Because it is a preparation that being secret, the manufacture of which is being secretly conducted, I can have no knowledge as to its properties or its component parts, and because physicians have a prejudice against such remedies.

Q. 20. Then, in your judgment, it falls in the category of patent or quack medicines, does it not?

A. It is what is known as a patent medicine; yes, sir.

Q. 21. I hand you another paper which has been introduced in evidence in this case and is marked "Respondent's Exhibit No. 5." Will you look at the list of ingredients there, and see whether there is any one or more of the ingredients that will permanently cure habitual constipation?

(Objected to as incompetent, irrelevant, and immaterial, and not in rebuttal of anything offered by the complainant.)

A. No, sir; I see nothing there that I believe would have any such action.

Q. 22. The ingredients seem to be practically the same, do they not? A. Yes, sir.

Cross-Examination.

(By Mr. OLNEY.)

X. Q. 1. Doctor, I understand you to say that you never had prescribed "Syrup of Figs"?

A. Yes, sir.

X. Q. 2. You know nothing about it except what you see advertised.

A. Oh, yes; I think every physician has considerable knowledge as to the preparation.

X. Q. 3. He has considerable knowledge as to the preparation?

A. Yes; that is, as to the results and of its popular use by patients of his, in families.

X. Q. 4. You think every physician has a knowledge as to its popular use?

A. I should think most physicians had.

X. Q. 5. Have you any personal knowledge of its use?

A. I have personal knowledge of many of my patients using it.

X. Q. 6. You have never used it yourself?

A. I have never prescribed it nor used it personally.

X. Q. 7. What is your business at the present time, doctor? A. Physician.

X. Q. 8. You are assessor of this city and county?

(Objected to as incompetent, irrelevant, and immaterial.)

A. I am.

X. Q. 9. You were a member of the board of supervisors of this city during the last two years, were you not?

(The same objection.)

A. Yes, sir.

X. Q. 10. Have you prescribed senna in your practice?

A. Yes, many times.

X. Q. 11. What for? A. For constipation.

X. Q. 12. It is looked upon by physicians, is it not, as being a very excellent cathartic?

A. Yes, in certain quantities.

X. Q. 13. It is excellent in one respect because it does not irritate the bowels, is it not?

A. That depends upon the patient and upon the dose.

X. Q. 14. Is they any other cathartic that you know of as good for general use as senna?

A. As good for general use?

X. Q. 15. Yes.

A. Yes, I think there are some catharties that are better.

X. Q. 16. What are they?

A. What is known as cascara sagrada, or sacred bark.

X. Q. 17. You think that is a better laxative or cathartic than senna? A. In many cases, yes.

X. Q. 18. In many cases? But I am talking about the general use.

A. Well, I would answer that question by saying that chronic constipation is due to so many different causes that it is hard to compare one drug with another, because all fail, in many cases, in a large proportion of cases.

X. Q. 19. I suppose chronic constipation comes from the system not being in its natural state; that is to say, the stomach and bowels do not perform their natural functions.

A. Some cases arise that way, but there are many other causes very different in their nature which produce chronic constipation.

X. Q. 20. Does it not come from an inactive, torpid condition of the stomach and bowels and the digestive organs? A. No, sir.

X. Q. 21. From what other causes does it come?

A. A great many causes. It could come from a mechanical constriction of some part of the bowel, as, for instance, a stricture formed by pressure on the bowel from some enlarged organ which lies outside of it and against it. Many other cases come from incurable diseases, such as cancer, which may effect some part of the gastro-intestinal tract of the stomach and bowels. Many cases entirely dependent upon a diseased liver due to the absence of secretion of bile which prevents a daily movement of the bowels, and many other cases which are so diversified in nature that it becomes folly to speak about any one drug having an extended use in common cases of chronic constipation. Unless you limit the cause to one of a certain category, so far as cause is concerned, no man can give any intelligent testimony.

X. Q. 22. Now, we will limit it to the causes arising from a torpid condition of the bowels and of the digestive organs, eliminating cases where there is outside diseases and outside pressure, and I will ask if in such cases as

that senna is not the best cathartic known to the medical profession?

A. No; I think those that are due to torpor, or atony, which is practically the same condition—lack of tone—are better treated as a routine practice by some other preparations.

X. Q. 23. What other preparations?

A. Well, the principal one I mentioned, and is known popularly as sacred bark. I would like to say, however, as I stated in the first instance, that senna is a standard, and is found to be of great usefulness in treating a great many cases of chronic constipation—so recognized by authorities.

X. Q. 24. Well, isn't it recognized by the profession generally as the best of all drugs for the purpose stated by you in your last answer.

A. That is, for the purpose of what?

X. Q. 25. That is for general use as a cathartic where the constipation does not come from some outside or other source than the condition of the bowels and stomach?

A. No, I could not say that. My impression is that the best cathartic for chronic or habitual constipation, due to atony of the bowels, or a condition of torpor is cascara sagrada, or sacred bark, but I would say that senna is very valuable in cases of chronic constipation, especially in children.

X. Q. 26. That question did not relate to your information, but to the general opinion of the profession.

Mr. ROWE.—And as an answer to the question he

stated that he did not consider that senna was the best, or a permanent remedy.

Mr. OLNEY.—I didn't ask that.

A. I could not say what the opinion of the profession—

X. Q. 27. (Interrupting.)—You are speaking of your own practice now?

A. And of the information of others as to the action of the drugs. What the profession at large might think, I could not say. One finds very many different opinions as to the same drug.

X. Q. 28. Have you had any experience as a pharmacist? A. Yes, sir.

X. Q. 29. Do you know whether or not the methods of preparing senna may have some influence upon its effect and its operation?

A. Do you mean the method of preparing a preparation which consists solely of senna, or its active ingredient, or a combination of other ingredients?

X. Q. 30. I mean where senna is the principal ingredient itself, in combination with other ingredients. Have you had any experience in that direction?

A. Yes, sir.

X. Q. 31. Did you find that any different result is obtained by different methods of treatment of senna with these combinations? A. Yes, sir.

X. Q. 32. Did you find or have you found any difference in the result from different methods of treatment of senna itself?

A. Well, when you say "treatment," what do you mean?

X. Q. 33. Different ways in which the substance of the senna is derived, whether it is an extract, or whether it is given in its original condition, or whatever way it is given, do you find any difference?

A. Do you mean to say does it make any difference as to the results whether you administer senna itself, or some extract derived from senna?

X. Q. 34. Yes, sir.

A. Yes.

X. Q. 35. Suppose you found from that experience that to overcome habitual constipation it is necessary for the patient to take extreme care of his diet.

A. In many cases you cannot correct it unless the patient observes rules as to diet.

X. Q. 36. Isn't it so in all cases except where constipation comes from some disease or cause, like cancer or mechanical obstruction?

A. No, I could not say that is so in all cases. In all cases certain modifications of diet will assist nature in relieving chronic constipation, if that is what you mean.

X. Q. 37. Yes. Now the use of senna and an appropriate course of diet, may it not, in your opinion, overcome habitual constipation, unless that constipation arises from some outside or mechanical cause?

A. No, I could not say that that is true.

X. Q. 38. Could you say that it was true of any medicine?

A. That it would overcome chronic constipation?

X. Q. 39. Yes.

A. Only in a certain percentage of cases; not in all cases.

X. Q. 40. I suppose in such cases it is very important that the habits of the patient should be regular, that he should form regular habits.

A. That is a very important element in habitual or chronic constipation.

Redirect Examination.

(By Mr. ROWE.)

R. Q. 1. Doctor, will any regime or habits or custom used by a patient in connection with the use of a cathartic cure habitual constipation?

A. Well, you might have a case of habitual constipation that could be entirely cured by a marked alteration in the habits and regime of the patient. Of course, in this case, a combination of senna as a drug with that regime would cure the case. But I cannot consider that senna by itself, or that senna in combination with those changes in the mode of the patient, in the mode of his daily living as to diet and habit, would be of predominant efficacy.

R. Q. 2. In other words then the patient would have to be advised as to his diet and his general habits as well as to the remedy that he was taking for habitual constipation, in order to create a permanent cure, would he not? The mere administration of senna alone would not, as I have stated before, effect a permanent cure of habitual constipation?

A. No; I can call to mind no case where I would expect from the use of senna a cure of habitual constipation, but these different things are factors.

R. Q. 3. Now, doctor, I ask you if there is any remedy known to the materia medica, or the profession that will permanently cure habitual constipation.

A. No, sir; not as you use the term "cure" in its broad sense. There is no remedy known to the materia medica, because as I have stated, it depends upon so many different factors that it is folly to expect to remove the condition.

R. Q. 4. Isn't it generally conceded among the profession that cascara sagrada will come as near effecting that result as anything else?

A. I think in many cases it will come nearer to it than any other drug.

Recross Examination.

(By. Mr. OLNEY.)

R. X. Q. 1. Doctor, if a patient adopts regular habits and an intelligent proper system of diet, will not the proper use of senna add materially to overcoming habitual constipation?

A. There is no doubt that while you are using senna you will overcome habitual constipation; if you mean by that that you will overcome it in the sense of overcoming it during the use, in contradistinction of curing it, that is, permanently removing it after the drug is stopped, why then the question is easily answered.

R. X. Q. 2. Well, now you use the term "cure," "cure it permanently"; will it be a material assistance under such circumstances as I have stated in curing the disease permanently?

A. From my experience and from my knowledge of the subject derived from different authorities I have never seen the claim put forward that senna has any effect in curing habitual constipation either alone, or in combination with other measures or drugs. That is, when I say "cured" I mean to remove the condition after the drug is itself discontinued.

R. X. Q. 3. Now, you have not answered my question yet.

A. If you will have it read to me I will try to answer it.

(R. X. Q. 2 read.) It will aid in the overcoming of it while the regime and the medicine is continued, yes.

R. X. Q. 4. Well, will it not result in most cases in a permanent cure?

A. The very methods without the drugs would. I could not say that the drug would assist in the element of cure. It will assist in overcoming it while it is used, but that it will assist in establishing a cure, I could not say that.

R. X. Q. 5. That is, in your opinion, the patient would get along just as well without the medicine if he adopted these habits?

A. Most cases of chronic constipation can be cured without drugs, and are better treated without drugs. When they belong to the class that you are referring to, many cases are cured entirely so.

R. X. Q. 6. But what I want to get at is that the proper use of drugs with a patient in that condition, is beneficial in starting him on the road to recovery. Isn't that a fact?

A. Yes; to start him on the road to recovery.

Examination in chief of

Dr. WILLIAM WATT KERR, a witness called on behalf of respondent; sworn.

(By Mr. ROWE.)

Q. 1. Doctor, will you state your name, age, residence, and occupation?

A. William Watt Kerr; I reside at 1200 Van Ness avenue; am a physician by occupation.

Q. 2. Doctor, I hand you a paper with an analysis of a preparation known as "Syrup of Figs," and will ask you to look over the ingredients in that compound and state whether or not you recognize any one that will permanently cure or overcome habitual constipation?

(Objected to as incompetent, irrelevant, and immaterial, and not in rebuttal of any testimony that has been offered on the part of the complainant, and opening a new issue in the case.)

A. No.

Q. 3. Senna will not do it, will it? A. No.

Q. 4. Senna neither alone nor in combination will do it, will it? A. No.

Q. 5. Then, if your answer is true, it would naturally follow, would it not, that any preparation compounded of these ingredients would not permanently overcome or cure habitual constipation? A. No, sir.

Q. 6. I hand you, doctor, another paper, respondent's Exhibit No. 5, introduced as an exhibit in this case, and will ask to look at that and see if you find any ingredients

there that will permanently overcome or cure habitual constipation? A. No.

Q. 7. Nor would a combination of all together do so, would it? A. No.

Q. 8. Doctor, have you ever heard of a preparation called "Syrup of Figs"? A. Yes, sir.

Q. 9. Did you ever prescribe it in your practice?

A. I have allowed patients to use it; yes, sir.

Q. 10. Did you prescribe it yourself?

A. Well, I never write it. I don't write proprietary articles as a rule, but I have told my patients that they could use it.

Q. 11. What would you prescribe it for if left to yourself, own voluntary counsel, if I may say?

A. I have never written it, but I have told patients they could use it as a domestic medicine, a household medicine.

Q. 12. You say you regard it as a proprietary article?

A. Well, we generally include it as a proprietary article.

Q. 13. You don't know any of the ingredients, do you?

A. Nothing, except I knew that it was a prescription of senna; that is all.

Cross-Examination.

(By Mr. OLNEY.)

X. Q. 1. Doctor, is there any medicine that of itself will permanently cure habitual constipation?

A. Not in all cases.

X. Q. 2. Well, is there any case in which it will do it at all as a medicine, of itself?

A. Some cases; occasionally you do get them.

X. Q. 3. Well, wouldn't it be a very unusual state of affairs?

A. Now, where it is due simply to a loss of tone in the bowels and muscle from some prolonged debilitated condition, you frequently, by restoring the tone to the bowels, right its action.

X. Q. 4. Well, now, suppose one should be in the condition which you would describe as that of habitual constipation, would you not consider a preparation of senna used in connection with a proper system of diet and regular habits, beneficial to overcome the disease?

A. Yes, sir.

X. Q. 5. Wouldn't you say generally that senna is a good material to use in overcoming habitual constipation?

A. I could not answer that generally. If it was simply to be used alone, to be used all the time, where a case had failed to respond to a permanent cure, then I might say that they could take the "Syrup of Figs," and frequently do that, that they could take the "Syrup of Figs" two or three times a week simply for relieving, but not effecting a cure.

X. Q. 6. But it would be a beneficial means in attaining the end sought which is a permanent cure? To use it properly would you not consider a preparation of senna as a legitimate and helpful method of attaining a cure?

A. No; simply for relieving the constipation whilst

the other remedies, whilst a proper dietetic treatment would produce the cure.

X. Q. 7. But even in that case the use of senna is beneficial?

A. It is beneficial under such circumstances; yes, sir.

X. Q. 8. Doctor, I assume, as a matter of common knowledge, that whatever remedy is used for assisting and overcoming disease it is necessary to have a proper diet and regular habits—a disease of this kind—I suppose that is true, isn't it? A. Yes, sir.

X. Q. 9. Now, doctor, assuming that senna is treated in such a way as to deprive it of its griping powers, is it or is it not a good cathartic?

A. It is a good cathartic, yes;

X. Q. 10. It is of use in curing habitual constipation?

A. No.

X. Q. 11. You don't mean to say that it cures it, but it is used as a means in curing it?

A. Oh, it may be used as any other cathartic in cleaning out the bowels.

Examination in chief of

E. C. ZIEG, a witness recalled on behalf of respondent.

(By Mr. ROWE.)

Q. 1. Mr. Zieg, I hand you a paper which is an analysis of "Syrup of Figs." Have you ever seen that paper?

A. Yes, sir.

Q. 2. Did you make that analysis? A. Yes, sir.

Q. 3. You made the analysis of a preparation known

as "Syrup of Figs," manufactured by the California Fig Syrup Company, did you, Mr. Zieg? A. Yes, sir.

Q. 4. And that is the result, on the paper you hold in your hand? A. Yes, sir.

Mr. ROWE.—I introduce that in evidence.

Mr. OLNEY.—We object to it as incompetent, irrelevant and immaterial; as not proper evidence at this stage of the case.

(Marked "Respondent's Exhibit No. 20.")

Cross-Examination.

(By Mr. OLNEY.)

X. Q. 1. Can you by an examination or an analysis of a medicine tell what are all of the ingredients that are in it?

A. Yes, provided they are used in quantities so as to be in any way perceptible to the senses.

X. Q. 2. What do you mean by "perceptible to the senses"?

A. In a great many cases, especially with organic drugs, the senses have to be relied upon in accomplishing results, the sense of taste or the sense of smell.

(Testimony closed.)

I certify that the foregoing depositions were taken at the place stated in the caption to said depositions, at the several times set forth in said depositions, in my presence, and in the presence of counsel for the respective parties to the cause in said caption entitled; that previous to giving his testimony, each of the witnesses in said deposition named was by me duly sworn to tell the truth, the whole

truth, and nothing but the truth, in said cause; that said depositions were taken down in shorthand writing and transcribed by B. C. Brown, pursuant to stipulation and agreement of counsel; that the reading and signing of said depositions, were by agreement of said counsel waived, as in stipulation herein set forth, and that I have retained said depositions for the purpose of delivering the same with my own hand to the Court for which they were taken.

Accompanying said depositions, and forming part thereof, are the several exhibits introduced in connection therewith, and referred to and specified therein.

I further certify that I am not attorney nor of counsel for any of the parties in said cause, nor in any way interested in the event thereof.

In witness whereof I have hereunto set my hand this twelfth day of April, 1899.

E. H. HEACOCK,

Examiner in Chancery, United States Circuit Court, Northern District of California.

[Endorsed]: Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

CALIFORNIA FIG SYRUP COMPANY,
Complainant,
vs.
CLINTON E. WORDEN et al.,
Respondents.

No. 12,378.
Monday,
June 5, 1899.

Oral Opinion on Final Hearing.

Warren Olney, Esq., Attorney for complainant.
Purcell Rowe, Esq., and John H. Miller, Esq., attorneys for respondents.

MORROW, Circuit Judge (orally).—This case is now before the Court, upon the pleadings and the evidence, for a final judgment. When the case was heard upon an application for a preliminary injunction, the Court considered all matters that were then presented, and awarded the preliminary injunction, upon the ground that the complainant had made such a showing by the pleadings and affidavits that it was entitled to an injunction against the sales of Fig Syrup by the defendant. (86 Fed. 212.) The case as now presented supports the allegations of the bill of complaint, and, in my judgment, presents a controversy not very different from the one considered by the Court upon the application for the

injunction. There is some little difference in the arguments and briefs of counsel. A little more of an effort is made by the respondents to impeach the equities of the bill of complaint, and the language of the briefs is a little more vigorous than it was in the preliminary hearing. The complainant is now charged with deception somewhat more specifically than before in the character of the article for which he seeks protection, but I do not discover any different principles involved in the determination of the issues than were originally presented to and considered by the Court.

The complainant produces an article called a "Fig Syrup," or "Syrup of Figs," and from the evidence it appears that it originated the article or preparation produced and extensively sold under that name. It appears from the testimony that the respondents have made an article of similar character, and have put it up in bottles under substantially the same name as complainant's preparation. There are some differences in the matter of labels and the appearance of the bottles, but they are not such differences as would attract the attention of the ordinary purchaser. That is to say, if a person desired to purchase a bottle of California "Fig Syrup," or "Syrup of Figs," prepared by the complainant, there would be no difficulty in selling to such a purchaser the article prepared by the respondents. Under the law, as it has been recently construed by the Court, the complainant in such a case is entitled to be protected from such an unfair competition. The Courts have been advancing with respect to this question of protecting persons in their legitimate business enterprises from the appropriation of

others. They will restrain persons who are engaged in what is called unfair competition in trade, and will prevent them from appropriating the fruits of skill and enterprise of others.

"Irrespective of any question of trademarks, rival manufacturers have no right, by imitative devices, to beguile the public into buying their wares under the impression that they are buying those of their rivals."

Coates v. Merrick Thread Co., 149 U. S. 562.

The respondents contend that this case involves only a question of trademark. But on the part of the complainant it is claimed that this is not merely a trademark case, but that it goes further, and involves unfair competition, wherein the respondents hope to trade upon the reputation of the complainant's preparation. The cases where this article has been in controversy in other circuits appear to have turned upon the question of whether or not there was an infringement of the complainant's trademark. But in this circuit the Circuit Court of Appeals, in the case of the Improved Fig Syrup Co. v. California Fig Syrup Co., 54 Fed. 175, has, in my judgment, determined that this complainant is entitled to be protected, not only in its trademark, but in its business, in the production and sale of this particular article, as a "liquid laxative medicine," and that the production by any other person of a compound that could be sold to the ordinary purchaser as complainant's compound is an infringement of the business of the complainant in the sale of the article. I so construe the opinion of the Circuit Court of Appeals in the case cited, and I feel that I must follow that construction in entering a final judgment in

this case. I may say, further, that I am satisfied with that opinion. It seems to me to be supported by recent cases in the Seventh Circuit, as well as in England, where articles not more meritorious than this article, in the exclusive right claimed for a name, have been fully protected by the courts from unfair competition in the sale of articles under similar names.

It is said with much earnestness on behalf of the respondents in this case, that the complainant's claim for its California "Fig Syrup" that it permanently overcomes habitual constipation is not justified by the evidence, and for that reason the claim should be treated as fraudulent or deceptive, and that, therefore, the complainant has not come into a Court of equity with clean hands. The effect of any medicine to permanently relieve constipation is, as I understand it, largely a matter dependent upon the constitution and habits of the person treated. It is not an absolute fact that any medicine permanently relieves the disorder. The practice of medicine differs in this respect from the practice of surgery. In surgery, when a limb is cut off or a tumor removed, the effect is positive and certain, but medicine is administered to assist nature in regaining its normal condition. I do not understand that medicine alone produces a permanent cure in such ailments as pertain to the natural functions. It is rather that medicine assists in securing relief. And while a person afflicted with permanent or chronic constipation could probably not be cured by merely taking "Fig Syrup," neither could he be by taking any of the other preparations mentioned in the testimony of the physicians. These remedies are intended to assist nature in re-

moving disorder from the system, and that is all that can be said of any of them. It follows that the objection urged by the respondents that complainant's preparation does not produce the effect claimed for it is not, under the circumstances, an objection that can be entertained as establishing the complainant's preparation as fraudulent and deceptive. It may not possess all the virtues claimed for it, but I am not prepared to say that the complainant is engaged in preparing and selling an article under the cover of false and fraudulent representations. In my opinion, it is as much entitled to the protection of the court as the "Hunyadi Janos Water," in Saxlehner v. Apollinaris Company, 1 Ch. Div. (1897) 893; 13 Times Law Rep. 258; the "Red Cross Plaster," in Johnson v. Bauer, 82 Fed. 662; "Baker's Chocolate," in Walter Baker & Co. v. Sanders, 80 Fed. 889; or the "Chicago Waists," in Gage-Downs Co. v. Featherbone Corset Co., 83 Fed. 213.

I shall, therefore, direct that an interlocutory decree be entered in this case in favor of the complainant, and the usual reference to the Master.

[Endorsed]: Filed June 5, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

CALIFORNIA FIG SYRUP CO. (a Corporation),
Complainant,
vs.
CLINTON WORDEN & CO. (a Corporation), J. A. BRIGHT, T. F. BACON, E. LITTLE, C. J. SCHMELZ and LUCIUS LITTLE,
Defendants.
No. 12,378.

Interlocutory Decree with Reference to Master to Ascertain Profits and Damages.

At a stated term, to wit, the March term, 1899, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on the fifth day of June, 1899. Present: the Honorable W. W. MORROW, Circuit Judge.

This cause having come on to be heard upon the bill of complaint herein, the answer of the defendants, the replication of the complainant, and the proofs, documentary and written, taken and filed in said cause, and having been argued by counsel for the respective parties, and submitted to the Court for consideration and decision,

Now, therefore, on consideration thereof, it is ordered, adjudged and decreed, and the Court doth hereby order, adjudge and decree as follows, to wit:

That the name or term "Syrup of Figs" or "Fig Syrup" was first applied by R. E. Queen, the predecessor of complainant, to a liquid laxative medicine, and, since the year 1879, the complainant and its said predecessor, R. E. Queen, have used the said name as the designation of a liquid laxative medicine. That said medicine has become known in the drug trade, among physicians, and by the public generally, as "Syrup of Figs" or "Fig Syrup," and, whenever said term is used in the drug trade or by other persons, the complainant's said preparation is understood to be referred to. That large quantities of said medicine have been sold under said name, and the business of complainant in preparing and selling said medicine is very extensive and valuable.

That the defendant, Clinton E. Worden & Co., has manufactured, and all the defendants have sold, a laxative medicine marked with said name, in imitation of the name used by complainant, and for the purpose of and with the design and intent of inducing purchasers to buy defendant's said preparation instead of the complainant's. That by so doing the said defendants, and each and all of them, have intringed upon the exclusive right of the complainant to the use of the name "Syrup of Figs" or "Fig Syrup," as applied to a liquid laxative medicine, and, prior to the commencement of this suit, said defendant, Clinton E. Worden & Co., has manufactured, and the other defendants herein have sold, said preparation made by the said Clinton E. Worden & Co. in imitation of complain-

ant's medicine, in large quantities, and have placed, in plain, conspicuous letters thereon, in imitation of the complainant's labels, the name "Syrup of Figs" and "Fig Syrup," as charged in the bill of complaint.

And it is further ordered, adjudged and decreed that the complainant do have and recover of and from the said defendants, Clinton E. Worden & Co., a corporation, J. A. Bright, T. F. Bacon, E. Little, C. J. Schmelz and Lucius Little, the profits, gains and advantages which said defendants, or either of them, have received or made, or which have arisen or accrued to them, or either of them, from the infringement of the rights of complainant by using said name, and by the making, using and selling, or the making, using or selling, of said liquid laxative medicine, having placed thereon the name "Syrup of Figs" or "Fig Syrup," or any other name in imitation of complainant's said medicine.

And it is further ordered, adjudged and decreed that the said complainant do recover of the defendants its costs and charges and disbursements in this suit, to be taxed.

And it is further ordered, adjudged and decreed that it be referred to E. H. Heacock, Esq., the standing Master in Chancery of this Court, residing in the city and county of San Francisco, Northern District of the State of California, to ascertain and take and state and report, and report to this Court an account of the liquid laxative medicine manufactured and sold by each of the defendants above named, and also the gains, profits and advantages which the said defendants, or either of them, have received or made, or which have arisen or accrued to

them, or either of them, or it, from infringing the said exclusive rights of the said complainant by the manufacturing, selling, or manufacturing or selling of a liquid laxative medicine stamped with the name "Syrup of Figs" or "Fig Syrup."

And it is further ordered, adjudged and decreed that the complainant on such accounting have the right to cause an examination of the defendants and each of them, and their and each of their agents, servants and workmen, or other witnesses as may be necessary to take said accounting, and also the production of books, vouchers and documents of which said defendants, and their and each of their attorneys, agents and workmen may be possessed, and cause them to attend for such purpose before the said Master from time to time as such Master may direct.

And it is further ordered, adjudged and decreed that the said Master shall segregate and separately state the gains, profits and advantages which each of the said defendants has received or made on account of his or its infringement of the said rights of complainant.

And it is further ordered, adjudged and decreed that a perpetual injunction be issued in this case against the said defendants, Clinton E. Worden & Co. (a corporation), J. A. Bright, T. F. Bacon, E. Little, C. J. Schmelz, and Lucius Little, restraining and perpetually enjoining them and each of them, and their and each of their servants, agents, clerks and workmen, and all persons claiming or holding under or through them, from making, manufacturing, or using or selling, or offering for sale, or in any way disposing of a liquid laxative medicine or preparation under the name "Syrup of Figs" or "Fig Syrup," or under

any name in colorable imitation of the name "Syrup of Figs," and from making, selling, or offering for sale, directly or indirectly, any medical liquid, laxative preparation put up in bottles, boxes, or packages similar in form and arrangement to the bottles or packages used by complainant in the manufacture and sale of its said liquid laxative preparation, or so closely resembling the bottles or packages used by complainant as to be calculated to deceive the public, and from using the name "Fig Syrup Company," and from using a name whereof the words "Fig Syrup" or "Syrup of Figs Company" form a part as a business name in connection with the manufacture of a liquid laxative preparation, pursuant to the prayer of the said bill of complaint.

WM. W. MORROW,
Judge.

[Endorsed]: Filed and entered June 7, 1899. Southard Hoffman, Clerk.

In the Circuit Court of the United States, in and for the Northern District of California, Ninth Circuit.

CALIFORNIA FIG SYRUP COMPANY (a Corporation),
Complainant,
vs.
CLINTON E. WORDEN & COMPANY (a Corporation) et al.,
Respondents.

Petition for Allowance of Appeal.

The above named respondents, conceiving themselves aggrieved by the decision and decree made by this Court on the fifth day of June, 1899, in the above entitled cause, do hereby appeal from the said decision, order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and complainants pray that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order, decision, and decree were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. The decision, order, and decree complained of by the respondents, and from which this appeal is taken, is the decision, order, and decree of this Court.

And your petitioner will ever pray, etc.

Dated June 28, 1899.

PURCELL ROWE,
Attorney for Respondents.

JOHN H. MILLER,
Of Counsel.

[Endorsed]: Filed July 5, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

Order Allowing Appeal.

The foregoing petition being filed and presented to the Court, in open Court, it is now ordered by the Court that the appeal as prayed for be allowed, that an order of Court be entered accordingly, and that a bond for costs on appeal in the sum of five hundred ($500) dollars be filed herein, and that a citation do issue accordingly.

Dated July 5, 1899.

WM. W. MORROW,
Judge.

[Endorsed]: Filed July 5, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, in and for the Northern District of California, Ninth Circuit.

CALIFORNIA FIG SYRUP COMPANY (a Corporation),
Complainant.

vs.

CLINTON E. WORDEN & COMPANY (a Corporation) et al.,
Respondents.

Assignment of Errors.

Now comes Clinton E. Worden & Company, respondent and appellant herein, by Purcell Rowe, Esq., and John H. Miller, Esq., their counsel, and specify the following as errors upon which they will rely and which they will urge on their appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the final decree heretofore made and entered in the above-entitled cause in the Circuit Court of the United States for the Northern District of California, on the fifth day of June, A. D. 1899.

The honorable the Circuit Court erred:

I.

In granting and continuing an injunction so far as it relates to the words "Syrup of Figs" or "Fig Syrup" to be used for a liquid, laxative, medicinal compound.

II.

In granting and continuing an injunction so far as it related to the making, using and selling any liquid, laxative medicine marked with the name "Syrup of Figs" or "Fig Syrup."

III.

In holding that the complainant is entitled to a trademark in the name "Syrup of Figs" or "Fig Syrup," as applied to a liquid, laxative, medicinal compound.

IV.

In holding that the use of the name "Syrup of Figs" or "Fig Syrup" by respondent, upon respondent's liquid, laxative, medicinal compound, is unfair competition by respondent with complainant's business.

V.

In not holding that the name "Syrup of Figs" or "Fig Syrup" is descriptive, and, if not descriptive, is deceptively used by complainant with the intent and purpose of deceiving the public, and that the public are so deceived.

VI.

In not holding that the packages and advertisements of complainant represent that complainant's preparation is a laxative fruit syrup, made from the juice of the California fig.

VII.

In not holding that the ordinary purchaser believes when purchasing complainant's article that he is buying

a laxative the essential ingredient of which is the California fig.

VIII.

In not holding that the ordinary purchaser would be deceived to his harm by the statements on complainant's advertisements and packages.

IX.

In not holding that there were material misrepresentations in the name of complainant's preparation and on complainant's labels, bottles, and packages and advertising matter.

X.

In holding that the name "Syrup of Figs" or "Fig Syrup" is a name known to the drug trade, to the medical profession, and the public as meaning only the preparation of complainant.

XI.

In holding that respondent had been guilty of fraud and deceit, in giving the name "Syrup of Figs" or "Fig Syrup" to its preparation.

XII.

In holding that complainant invented the name "Syrup of Figs" or "Fig Syrup."

XIII.

In holding the equities in this case in favor of complainant and against respondent.

XIV.

in holding that the testimony shows that respondent had, and could have, no other object in adopting for its preparation the name "Syrup of Figs" or "Fig Syrup" than to trade upon the popularity of complainant's preparation, to defraud complainant of the fruit of complainant's skill, labor and expenditure in establishing a reputation for complainant's preparation, and to pass off respondent's preparation as that of complainant, and to trade on complainant's advertising and the goodwill of complainant's business, by unfair competition, and that nothing appears from which the Court can find that complainant has been guilty of moral wrong as to deprive it of the protection of a Court of equity.

XV.

In entering the interlocutory decree in favor of the complainant herein for an injunction.

XVI.

In ordering an injunction against the respondent.

In order that the foregoing assignment of errors may be and appear of record, the respondent presents the same to the Court, and prays that such disposition be made thereof as is in accordance with the law and the statutes of the United States in such cases made and provided,

and respondent prays a reversal of said interlocutory decree.

Dated twenty-eighth June, 1899.

PURCELL ROWE,
Attorney for respondent.

JOHN H. MILLER,
Of Counsel.

[Endorsed]: Filed July 5, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, in and for the Northern District of California, Ninth Circuit.

CALIFORNIA FIG SYRUP COMPANY (a Corporation),
Complainant,
vs.
CLINTON E. WORDEN & COMPANY (a Corporation) et al.,
Respondents.

Order Allowing Appeal and Approving Bond.

Upon consideration of petition of respondents herein, this day filed and presented to the Court, praying for an allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decision and order of the Court heretofore passed on the fifth day of

June, 1899, and from the decree formally entered therein on the seventh day of June, 1899, the respondents presenting now likewise their assignments of error on the said appeal, which assignments of error have been duly filed herein;

It is now by the Court ordered that the said appeal as prayed for be, and it is hereby, allowed, and it is ordered that the respondents cause to be filed, with one or more sureties, a good and sufficient bond for costs on appeal in the sum of five hundred ($500) dollars, and the respondents now presenting such bond, with ———————— as surety thereon, it is now by the Court ordered that the same be, and it is hereby approved, and it is now ordered that citation upon the appeal do issue accordingly.

Dated July 5, 1899.

WM. W. MORROW,
Judge.

[Endorsed]: Filed July 5, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, of the Ninth Judicial Circuit, Northern District of California.

CALIFORNIA FIG SYRUP COMPANY (a Corporation),
Complainant,
vs.
CLINTON E. WORDEN & CO. (a Corporation, J. A. BRIGHT, T. F. BACON, E. LITTLE, C. J. SCHMELZ, and LUCIUS LITTLE,
Defendants.
No. 12,378.

Certificate to Transcript on Appeal.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing pages, numbered from one to five hundred and ninety-six, inclusive, to be a full, true, and correct copy of the record and proceedings in the above-entitled cause (excepting therefrom the complainant's Exhibits, "A," "B," "D," "E," "F," "G," "H," "I," "U," and "V"; Respondents' Exhibits Nos. 1, 2, 3, 4, and 12—being exhibits of material—complainant's Exhibits "C," "C^1," "C^2," "C^3," "J," "K," "L," "M," "N," "O," "P," "Q," "R," "S," "T," and "W," and respondents' Exhibits Nos.

5, 6, 7, 8, 9, 10, 11, 13, 14A, 14B, 15, 17, 18, 19 and 20—being documentary exhibits—which said original exhibits, by order of Court, accompany and form a part of this record), and that the same together constitute the transcript of the record herein, upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript is three hundred and twenty-three dollars and thirty cents, and that said amount was paid by the defendants herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this thirtieth day of October, A. D. 1899.

[Seal] SOUTHARD HOFFMAN,

Clerk of the United States Circuit Court, Northern District of California.

[10 cts. Int. Rev. Stamp. Cancelled.]

Citation.

UNITED STATES OF AMERICA.—ss.

The President of the United States, to California Fig Syrup Company (a corporation), Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the fourth day of August next, pursuant to an order allowing an appeal filed in the Clerk's office of the Circuit Court of the United States,

Ninth Circuit, Northern District of California, in a certain action numbered 12,378, wherein Clinton E. Worden & Co. (a corporation), J. A. Bright, T. F. Bacon, E. Little, C. J. Schmelz, and Lucius Little are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Wm. W. MORROW, Judge of the United Staes Circuit Court, Ninth Circuit, Northern District of California, this fifth day of July, A. D. 1899.

WM. W. MORROW,
Judge.

Service of within citation and receipt of a copy thereof is hereby admitted this fifth day of July, 1899.

OLNEY & OLNEY,
Attorneys for complainant.

[Endorsed]. No. 12,378. Circuit Court of the United States, Ninth Circuit, Northern District of California. California Fig Syrup Co. (a corporation), complainant, vs. Clinton E. Worden & Co. (a corporation) et al., defendants. Citation.

Filed July 6, 1897. Southard Hoffman, Clerk.

[Endorsed]: No. 564. United States Circuit Court of Appeals, for the Ninth Circuit. Clinton E. Worden & Co. (a corporation), J. A. Bright, T. F. Bacon, E. Little, C. J. Schmelz, and Lucius Little, appellants, vs. California Fig Syrup Company (a corporation), appellee. Transcript of

Record. Appeal from the United States Circuit Court, Ninth Judicial Circuit, in and for the Northern District of California.

Filed Oct. 30, 1899.

FRANK D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.

EXHIBITS.

Complainant's Exhibit "C."

SYRUP OF FIGS

ACTS GENTLY ON THE

KIDNEYS, LIVER AND BOWELS

CLEANSES THE SYSTEM EFFECTUALLY.

DISPELS COLDS HEADACHES & FEVERS

OVERCOMES HABITUAL CONSTIPATION PERMANENTLY.

FOR SALE BY ALL DRUGGISTS

ONE ENJOYS

SYRUP OF FIGS.

TO GET ITS BENEFICIAL EFFECTS

BUY THE GENUINE-MANF'D BY THE

CALIFORNIA FIG SYRUP CO.

vs. California Fig Syrup Co.

599

3623

United States Circuit Court, Northern District of California. Cal. Fig. Syrup Co. vs. Worden & Co. et al. No. 12,378. Complainant's Exhibit "C." E. H. H., Examiner.

Filed April 12, 1899. Exhibit "C." Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. United States Circuit Court of Appeals for the Ninth Circuit. Complainant's Exhibit "C."

Received Oct. 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

Complainant's Exhibit "C1."

[The Evening Post, Louisville, Wednesday, April 22, 1896.]

WELL KNOWN AND INTERESTING.

It is well known to all intelligent people that the few world-renowned remedies which have stood the test of time and grown constantly in favor with the most eminent physicians, and with the public generally, have everything to gain and nothing to lose by giving to the world a thorough knowledge of the source of their active principles, as it is equally well known that the great reputation of such remedies is due not only to the excellence of the combination, but also to the skillful methods employed by the manufacturers in producing it.

For many years past the CALIFORNIA FIG SYRUP CO. has proclaimed to the world the fact that the laxative and carminative principles of its remedy, named Syrup of Figs, are obtained by a method of its own from an excellent combination of

SENNA AND OTHER AROMATIC PLANTS

known to act most beneficially on the system, and that a very small quantity of the juice of figs is used, merely to promote the pleasant taste of the combination.

It is well known that many fruits are wholesome as foods, but that, being nutritious, the juice of such fruits may be used in large quantities as food, and that when used in medicinal compounds the quantity taken is so small as to have no medicinal value. The name Syrup of Figs was given to the laxative remedy manufactured by the California Fig Syrup Co. merely as a trade name, and the satisfaction which the remedy has given to millions of people, and its constant growth in favor with the most eminent physicians, and with millions of families, is ample evidence of the excellence of the plants used in the combination, and of the scientific method and exceptional facilities of the California Fig Syrup Co. for manufacturing the most perfect laxative known.

Owing to the valuable reputation which the laxative remedy named Syrup of Figs and manufactured by the California Fig Syrup Co. has obtained many imitations have been offered to the public, which are sold under similar names, but which have not the merits of the original remedy, and therefore should be avoided. As some imitations claim to obtain medicinal virtues from fruits, notwithstanding the above facts, it is more than ever important to the California Fig Syrup Co. to have the public know and understand that the true and original remedy, named Syrup of Figs, is manufactured from an excellent combination of laxative and carminative plants, combined with a very small quantity of the juice of figs, and that the company does not claim, and has never claimed, to obtain the medicinal properties of the remedy from figs.

The great majority of druggists are too honorable to offer imitations to their customers. They know the importance of standard medicinal agents, manufactured by successful and world-renowned manufacturing chemists, and are willing to make great sacrifices to supply their customers with the highest products of modern science, and they know that the name of the California Fig Syrup Co. is a guarantee of the excellence of the laxative remedy which it manufactures, and therefore will not sell imitations, but some dealers who have no regard for the quality of medicinal compounds, and desire to make the largest profit possible, are constantly endeavoring to sell the imitations. A well-informed public is able to protect itself against such imposition. The trouble with the imitations is not always a failure to act on the system, but that they sometimes act too violently; and when taken for any length of time they invariably tend to require constantly augmented doses, and in that way permanently injure the system. On the other hand, the laxative remedy named Syrup of Figs, and manufactured by the California Fig Syrup Co., acts naturally and gently on the system, and has a strengthening and refreshing effect, so that it is permanently beneficial and may be taken or discontinued as desired.

Always note the full name of the Co. printed on the front of each package when purchasing, as well as the name, Syrup of Figs.

CALIFORNIA FIG SYRUP CO.

Louisville, Ky. San Francisco, Cal. New York, N. Y.

United States Circuit Court, Northern District of California. California Fig Syrup Co. vs. Worden & Co. et al. No. 12,378. Complainant's Exhibit C 1. E. H. H., Examiner.

Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. United States Circuit Court of Appeals for the Ninth Circuit. Complainant's Exhibit C 1.

Received October 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

Complainant's Exhibit "K."

[From "The Annals of Hygiene," December, 1893.]

The Demand For

a pleasant and effective liquid laxative has long existed—a laxative that would be entirely safe for physicians to prescribe for patients of all ages—even the very young, the very old, the pregnant woman, and the invalid—such a laxative as the physician could sanction for family use because its constituents were known to the profession and the remedy itself had been proven to be prompt and reliable in its action, as well as pleasant to administer and never followed by the slightest debilitation. After a careful study of the means to be employed to produce such

A Perfect Laxative

the California Fig Syrup Company manufactured, from the juice of True Alexandria Senna and an excellent combination of carminative aromatics with pure white sugar, the laxative which is now so well and favorably known under the trade name of "Syrup of Figs." With the exceptional facilities, resulting from long experience and entire devotion to the one purpose of making our product unequalled, this demand for the perfect laxative

is met by Our Method

of extracting the laxative properties of Senna without retaining the griping principle found in all other preparations or combinations of this drug. This method is known only to us, and all efforts to produce cheap imitations or substitutes may result in injury to a physician's reputation, and will give dissatisfaction to the patient; hence, we trust that when physicians recommend or prescribe "Syrup of Figs" (Syr. Fici Cal.) they will not permit any substitution. The name "Syrup of Figs" was given to this laxative, not because in the process

# of Manufacturing

a few figs are used, but to distinguish it from all other laxatives, and the United States Courts have decided that we have the exclusive right to apply this name to a laxative medicine. The dose of

"SYRUP OF FIGS"

as a laxative is one or two teaspoonfuls given preferably before breakfast or at bed time. From one-half to one tablespoonful acts as a purgative, and may be repeated in six hours if necessary.

"Syrup of Figs" is never sold in bulk. It is put up in two sizes to retail at fifty cents and $1.00 per bottle, and the name "Syrup of Figs" as well as the name of the California Fig Syrup Company is printed on the wrappers and labels of every bottle.

CALIFORNIA FIG SYRUP COMPANY

SAN FRANCISCO, CAL.

LOUISVILLE, KY. NEW YORK, N. Y.

United States Circuit Court, Northern District of California. California Fig Syrup Co. vs. Worden & Co. et al. No. 12,378. Complainant's Exhibit K. E. H. H., Examiner.

Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. United States Circuit Court of Appeals for the Ninth Circuit. Complainant's Exhibit K.

Received October 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

Complainant's Exhibit "L."

[From "Food," a Journal of Hygiene and Nutrition, February, 1893.]

THE DEMAND FOR

a pleasant and effective liquid laxative has long existed—a laxative that would be entirely safe for physicians to prescribe for patients of all ages—even the very young, the very old, the pregnant woman and the invalid—such a laxative as the physician could sanction for family use because its constituents were known to the profession and the remedy itself had been proven to be prompt and reliable in its action, as well as pleasant to administer, and never followed by the slightest debilitation. After a careful study of the means to be employed to produce such

A PERFECT LAXATIVE

the California Fig Syrup Company manufactured, from the juice of True Alexandria senna and an excellent combination of carminative aromatics with pure white sugar, the laxative which is now so well and favorably known under the trade name of "Syrup of Figs." With the exceptional facilities, resulting from long experience and entire devotion to the one purpose of making our product unequaled, this demand for the perfect laxative

IS MET BY OUR METHOD

of extracting the laxative properties of senna without retaining the griping principle found in all other preparations or combinations of this drug. This method is known only to us, and all efforts to produce cheap imitations or substitutes may result in injury to a physician's reputation, and will give dissatisfaction to the patient; hence, we trust that when physicians recommend or prescribe "Syrup of Figs" (Syr. Fici Cal.) they will not permit any substitution. The name "Syrup of Figs" was given to this laxative, not because in the process

OF MANUFACTURING

a few figs are used, but to distinguish it from all other laxatives, and the United States Courts have decided that we have the exclusive right to apply this name to a laxative medicine. The dose of

"SYRUP OF FIGS"

as a laxative is one or two teaspoonfuls given preferably before breakfast or at bed time. From one-half to one tablespoonful acts as a purgative, and may be repeated in six hours if necessary.

"Syrup of Figs" is never sold in bulk. It is put up in two sizes, to retail at fifty cents and $1.00 per bottle, and the name "Syrup of Figs," as well as the name of the California Fig Syrup Company, is printed on the wrappers and labels of every bottle.

CALIFORNIA FIG SYRUP COMPANY,

SAN FRANCISCO, CAL. LOUISVILLE, KY. NEW YORK, N. Y.

United States Circuit Court, Northern District of California. California Fig Syrup Co. vs. Worden & Co. et al. No. 12,378. Complainant's Exhibit L. E. H. H., Examiner.

Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. United States Circuit Court of Appeals for the Ninth Circuit. Complainant's Exhibit L.

Received October 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

Complainant's Exhibit "M."

[From "The Dietetic and Hygienic Gazette," February, 1894.]

THE DEMAND FOR

a pleasant and effective liquid laxative has long existed—a laxative that would be entirely safe for physicians to prescribe for patients of all ages—even the very young, the very old, the pregnant woman and the invalid—such a laxative as the physician could sanction for family use because its constituents were known to the profession and the remedy itself had been proven to be prompt and reliable in its action, as well as pleasant to administer, and never followed by the slightest debilitation. After a careful study of the means to be employed to produce such

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CALIFORNIA FIG SYRUP COMPANY,

SAN FRANCISCO, CAL. LOUISVILLE, KY. NEW YORK, N. Y.

United States Circuit Court, Northern District of California. Cal. Fig. Syrup Co. vs. Worden & Co. et al. No. 12,378. Complainant's Exhibit "M." E. H. H., Examiner.

Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. United States Circuit Court of Appeals for the Ninth Circuit. Complainant's Exhibit "M."

Received Oct. 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

Complainant's Exhibit "N."

[From "Humanity and Health," December, 1894.]

THE DEMAND FOR

a pleasant and effective liquid laxative has long existed—a laxative that would be entirely safe for physicians to prescribe for patients of all ages—even the very young, the very old, the pregnant woman and the invalid—such a laxative as the physician could sanction for family use because its constituents were known to the profession and the remedy itself had been proven to be prompt and reliable in its action, as well as pleasant to administer, and never followed by the slightest debilitation. After a careful study of the means to be employed to produce such

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CALIFORNIA FIG SYRUP COMPANY,

SAN FRANCISCO, CAL. LOUISVILLE, KY. NEW YORK, N. Y.

United States Circuit Court, Northern District of California. California Fig Syrup Co. vs. Worden & Co. et al. No. 12,378. Complainant's Exhibit N. E. H. H., Examiner.

Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. United States Circuit Court of Appeals for the Ninth Circuit. Complainant's Exhibit N.

Received October 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

Complainant's Exhibit "O."

[From "The American Journal of Medical Sciences," June, 1894.]

The Demand For

a pleasant and effective liquid laxative has long existed—a laxative that would be entirely safe for physicians to prescribe for patients of all ages—even the very young, the very old, the pregnant woman, and the invalid—such a laxative as the physician could sanction for family use because its constituents were known to the profession and the remedy itself had been proven to be prompt and reliable in its action, as well as pleasant to administer and never followed by the slightest debilitation. After a careful study of the means to be employed to produce such

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as a laxative is one or two teaspoonfuls given preferably before breakfast or at bed time. From one-half to one tablespoonful acts as a purgative, and may be repeated in six hours if necessary.

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CALIFORNIA FIG SYRUP COMPANY

SAN FRANCISCO, CAL.

LOUISVILLE, KY. NEW YORK, N. Y.

United States Circuit Court, Northern District of California. Cal. Fig Syrup Co. vs. Worden & Co. et al. No. 12,378. Complainant's Exhibit "C." E. H. H., Examiner.

Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. United States Circuit Court of Appeals, for the Ninth Circuit. Complainant's Exhibit "O."

Received Oct. 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

Complainant's Exhibit "P."

[From "The Trained Nurse and Hospital Review," December, 1894.]

The Demand For

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as a laxative is one or two teaspoonfuls given preferably before breakfast or at bed time. From one-half to one tablespoonful acts as a purgative, and may be repeated in six hours if necessary.

"Syrup of Figs" is never sold in bulk. It is put up in two sizes to retail at fifty cents and $1.00 per bottle, and the name "Syrup of Figs" as well as the name of the California Fig Syrup Company is printed on the wrappers and labels of every bottle.

CALIFORNIA FIG SYRUP COMPANY

SAN FRANCISCO, CAL.

LOUISVILLE, KY. **NEW YORK, N. Y.**

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Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. United States Circuit Court of Appeals for the Ninth Circuit. Complainant's Exhibit P.

Received October 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

Complainant's Exhibit "Q."

[From "American Analyst," December, 1893.]

THE DEMAND FOR

a pleasant and effective laxative has long existed—a laxative that would be entirely safe for physicians to prescribe for patients of all ages—even the very young, the very old, the pregnant woman and the invalid—such a laxative as the physician could sanction for family use because its constituents were known to the profession and the remedy itself had been proven to be prompt and reliable in its action, as well as pleasant to administer, and never followed by the slightest debilitation. After a careful study of the means to be employed to produce such

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OF MANUFACTURING

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as a laxative is one or two teaspoonfuls given preferably before breakfast or at bed time. From one-half to one tablespoonful acts as a purgative, and may be repeated in six hours if necessary.

"Syrup of Figs" is never sold in bulk. It is put up in two sizes, to retail at fifty cents and $1.00 per bottle, and the name "Syrup of Figs," as well as the name of the California Fig Syrup Company, is printed on the wrappers and labels of every bottle

CALIFORNIA FIG SYRUP COMPANY,

SAN FRANCISCO, CAL. LOUISVILLE, KY. NEW YORK, N. Y.

United States Circuit Court, Northern District of California. California Fig Syrup Co. vs. Worden & Co. et al. No. 12,378. Complainant's Exhibit Q. E. H. H., Examiner.

Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. United States Circuit Court of Appeals for the Ninth Circuit. Complainant's Exhibit Q.

Received October 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

Complainant's Exhibit "R."

[From "Jenness Miller Monthly," March, 1895.]

Copyrighted.

THE DEMAND FOR

a pleasant and effective liquid laxative has long existed—a laxative that would be entirely safe for physicians to prescribe for patients of all ages—even the very young—the very old—the pregnant woman and the invalid—such a laxative as the physician could sanction for "household use" because its constituents were known to the profession, and the remedy itself had been proven to be prompt and reliable in its action, as well as pleasant to administer and never followed by the slightest debilitation. After a careful study of the means to produce

A PERFECT LAXATIVE

the California Fig Syrup Company manufactured the laxative which is now so well and favorably known under the name of Syrup of Figs. With our exceptional facilities for production this demand

IS MET BY OUR METHODS

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OF MANUFACTURING SYRUP OF FIGS

a few figs are used, but to distinguish it from all other laxatives. The dose of Syrup of Figs as a laxative is one or two teaspoonfuls given preferably before breakfast or at bed time. From one-half to one tablespoonful acts as a purgative, and may be repeated in six hours if necessary.

Syrup of Figs is never sold in bulk. It is put up in two sizes to retail at .50 and $1.00 per bottle, and the name Syrup of Figs, as well as the name of the California Fig Syrup Company, is printed on the wrappers and labels of every bottle.

CALIFORNIA FIG SYRUP COMPANY,

SAN FRANCISCO, CAL.

LOUISVILLE, KY. NEW YORK, N. Y.

United States Circuit Court, Northern District of California. Cal. Fig Syrup Co. vs. Worden & Co. et al. No. 12,378. Complainant's Exhibit "R." E. H. H., Examiner.

Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. United States Circuit Court of Appeals, for the Ninth Circuit. Complainant's Exhibit "R."

Received Oct. 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputp Clerk.

Complainant's Exhibit "T."

E.H.H.
Examiner

A Family Laxative.

Physicians are not inclined to recommend self medication to the laity. Yet there is one need which they are almost unable to supply. We refer to the "family laxative." The family physician is able to prescribe for the most complicated and obscure of maladies and yet is often puzzled to know just what to give when asked for a remedy which can be kept in the house for family use as a laxative, that shall be effective, free from danger, and not unpleasant to take. When absent on our summer vacation we were asked by four different parties, representing as many families, what we thought of the "Syrup of Figs." Not one word did we volunteer on the subject, and we were somewhat surprised to find that there was this small token of the very general use of that preparation. These parties said they derived more benefit from it and found it more pleasant to take than anything of the kind they had ever used. The simple question with them was, is it a dangerous compound? We informed them that its active ingredient was a preparation of senna, and that it was entirely free from danger. With this assurance they volunteered the information that they should continue to keep it in the house.

The therapeutical properties of senna are so well known that comment on this seems unnecessary. It might be well to notice, however, that Bartholow says it is "a very safe and serviceable cathartic," and that it is "highly prized as a remedy for constipation." He also makes the important observation that its use "is not followed by intestinal torpor and constipation."

The simple truth of the matter is, we have altogether too few preparations which we can recommend to our families as effective laxatives. But the California Fig Syrup company has one of the most desirable combinations for this purpose with which we are familiar. The Fig Syrup company gives to the profession the composition of this preparation, therefore there is no secret about it; the persons who use this laxative speak in the highest terms about it; and we are pleased to notice that a large number of physicians are prescribing it.

Viewed from the narrowest and most selfish standpoint the physician will lose nothing by recommending such a preparation as Syrup of Figs to his patients; while viewed from the highest standpoint of doing the best possible by those who place themselves in our care, we would say the profession cannot do better than give their indorsement to such a preparation.—American Analyst.

United States Circuit Court, Northern District of California. Cal. Fig Syrup Co. vs. C. E. Worden & Co. et al. No. 12,378. Complainant's Exhibit "T." E. H. H., Examiner.

Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. United States Circuit Court of Appeals, for the Ninth Circuit. Complainant's Exhibit "T."

Received Oct. 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

Complainant's Exhibit "W."

[From "The Cleveland Press," Tuesday, April 12, 1898.]

Important Happenings
When one learns of the qualities which commend an article to general favor, valuable information is acquired and in recognition of the fact, the California Fig Syrup Co. has continuously published, for many years past, that it obtains, by a method of its own, the medicinal laxative virtues of the choicest selections of senna and combines them with an excellent combination of aromatic carminatives, to form the pleasant and effective family remedy—Syrup of Figs. This remedy is so well and favorably known and has given such universal satisfaction throughout the world that it is interesting to note the above facts, also the statement which we make, and have always made, that the medicinal virtues and distinctive flavoring of the remedy are obtained from plants and not from figs, as figs are simply a food, and only a very small quantity of the juice of figs is used in the combination, to promote the pleasant taste, somewhat as one adds a little sugar to coffee or tea, not to give strength or flavor to the coffee or tea, but to make it more palatable, and with this difference, that coffee and tea are used as pleasant beverages, while Syrup of Figs, manufactured by the California Fig Syrup Co., is a most excellent medicinal laxative and always sold and used as such.
Knowing the above facts, leading physicians have recommended and millions of families have used this excellent family remedy, and it will always be known by the name of Syrup of Figs, or California Fig Syrup, as it is frequently called, as the genuine article is manufactured by the California Fig Syrup Co. only. But there are many imitations manufactured by unscrupulous parties and sold under similar names and, therefore, it is important always to note, not only the name of the remedy—Syrup of Figs—but also the full name of the Company—California Fig Syrup Co.—printed on the front of every package. The imitations are made from cheap medicated teas and contain narcotics and other injurious substances. The imitations act strongly, and the longer one takes them the greater the injury done. They are manufactured by houses known as "non-secret" manufacturers, because it is no secret to the trade that they are engaged in defrauding the public. As you value your health, beware of the imitations and to get the beneficial effects of the genuine remedy remember the full name of our Company—
CALIFORNIA FIG SYRUP CO.,
San Francisco, Cal.
Louisville, Ky. New York, N. Y.

United States Circuit Court, Northern District of California. Cal. Fig Syrup Co. vs. Worden & Co. et al. No. 12,378. Complainant's Exhibit "W." E. H. H., Examiner.

Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. United States Circuit Court of Appeals, for the Ninth Circuit. Complainant's Exhibit "W."

Received Oct. 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

Respondents' Exhibit No. 5.

COPY.

50 lbs. Alexandria Senna.
22 gall. Hot Water.
100 lbs. Sugar.
2 oz. Cinnamon Oil.
2 " Clove "
2 " Anise "
2 gall. Alcohol.

Hot water poured over the Senna and stands two hours before it is pressed; the alcohol and oils are then added. It stands twenty-four hours and then it is strained; the sugar is then added.

Ground Ginger is thrown between the layers of the Senna and pressed with the leaves together, it prevents griping.

2 lbs. to gall.

U. S. Circuit Court, N. Dist. of Cal. Cal. Fig Syrup Co. vs. Worden & Co. et al. No. 12,378. Respondents' Exhibit No. 5. E. H. H., Examiner.

Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. U. S. Circuit Court of Appeals, for the Ninth Circuit. Respondents' Exhibit No. 5.

Received Oct. 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

Respondents' Exhibit No. 6.

LAXATIVE FIG SYRUP. { R..... Page..... Book.....

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Chopped Figs	10 lb. av
Ground Senna	180 lb. av.
Ground Hyoscyamus	3 lb. av.
Alcohol 32 per cent.	Q. S. to percolate 30 gals.
Oil Peppermint	4 fl. ozs.
" Cloves	3 fl. ozs.
" Cassia	1 fl. oz.
" Anise	1 fl. oz.
Sol. Ess. Ginger	1½ pints.
Sugar	200 lbs.
Water to make	45 gals.

3 g. in 45
1 "

4 lbs. to gall.

15 128

U. S. Circuit Court, N. Dist. of Cal. Cal. Fig Syrup Co. vs. Worden & Co. et al. No. 12,378. Respondents' Exhibit No. 6. E. H. H., Examiner.

Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. U. S. Circuit Court of Appeals, for the Ninth Circuit. Respondents' Exhibit No. 6.

Received Oct. 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

Respondents' Exhibit No. 13.

Reno Evening Gazette.

VOL. XXXVI. RENO, WASHOE COUNTY, NEVADA, SATURDAY, NOVEMBER 19, 1898. NO 43

MISCELLANEOUS.

THE EXCELLENCE OF SYRUP OF FIGS

is due not only to the originality and simplicity of the combination, but also to the care and skill with which it is manufactured by scientific processes known to the CALIFORNIA FIG SYRUP CO. only, and we wish to impress upon all the importance of purchasing the true and original remedy. As the genuine Syrup of Figs is manufactured by the CALIFORNIA FIG SYRUP CO. only, a knowledge of that fact will assist one in avoiding the worthless imitations manufactured by other parties. The high standing of the CALIFORNIA FIG SYRUP CO. with the medical profession, and the satisfaction which the genuine Syrup of Figs has given to millions of families, makes the name of the Company a guaranty of the excellence of its remedy. It is far in advance of all other laxatives, as it acts on the kidneys, liver and bowels without irritating or weakening them, and it does not gripe nor nauseate. In order to get its beneficial effects, please remember the name of the Company—

CALIFORNIA FIG SYRUP CO.

SAN FRANCISCO, Cal.

LOUISVILLE, Ky. NEW YORK, N. Y.

United States Circuit Court, Northern District of California. Cal. Fig Syrup Co. vs. Worden & Co. et al., No. 12,378. Respondent's Exhibit No. 13. E. H. H., Examiner.

Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. United States Circuit Court of Appeals, for the Ninth Circuit. Respondent's Exhibit No. 13.

Received Oct. 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

Respondents' Exhibit No. 18.

MARCH 5, 1898

SYRUP of FIGS

ONE ENJOYS

Both the method and results when Syrup of Figs is taken; it is pleasant and refreshing to the taste, and acts gently yet promptly on the Kidneys, Liver and Bowels, cleanses the system effectually, dispels colds, headaches and fevers and cures habitual constipation. Syrup of Figs is the only remedy of its kind ever produced, pleasing to the taste and acceptable to the stomach, prompt in its action and truly beneficial in its effects, prepared only from the most healthy and agreeable substances, its many excellent qualities commend it to all and have made it the most popular remedy known.

Syrup of Figs is for sale in 50 cent bottles by all leading druggists. Any reliable druggist who may not have it on hand will procure it promptly for any one who wishes to try it. Do not accept any substitute.

CALIFORNIA FIG SYRUP CO.

SAN FRANCISCO, CAL.

LOUISVILLE, KY. NEW YORK, N.Y.

United States Circuit Court, Northern District of California. Cal. Fig Syrup Co. vs. Worden & Co. et al. No. 12,378. Respondent's Exhibit No. 18. E. H. H., Examiner.

Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. United States Circuit Court of Appeals, for the Ninth Circuit. Respondent's Exhibit No. 18.

Received Oct. 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

Respondents' Exhibit No. 19.

Harpers Bazar
Jan. 7th 99.

20

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SAN FRANCISCO, Cal.
LOUISVILLE, Ky. NEW YORK, N.Y.
For Sale by all Druggists. Price 50 cents per bottle.

United States Circuit Court, Northern District of California. Cal. Fig Syrup Co. vs. Worden & Co. et al. No. 12,378. Respondent's Exhibit No. 19. E. H. H., Examiner.

Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. United States Circuit Court of Appeals, for the Ninth Circuit. Respondent's Exhibit No. 19.

Received Oct. 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

Respondents' Exhibit No. 20.

ANALYSIS.
SYRUP OF FIGS.

R..... Page..... Book.....

℞ California Fig Syrup Co.

Extract of Senna, solid	7 per ct.
Cane Sugar	50 per ct.
Alcohol	3 per ct.
Water	40 per ct.
	100 per ct.

Flavoring.

Oil Peppermint, Oil Cloves, Oil Cassia, Cinnamon, Oil Coriander ..... ¼ of 1 per ct.

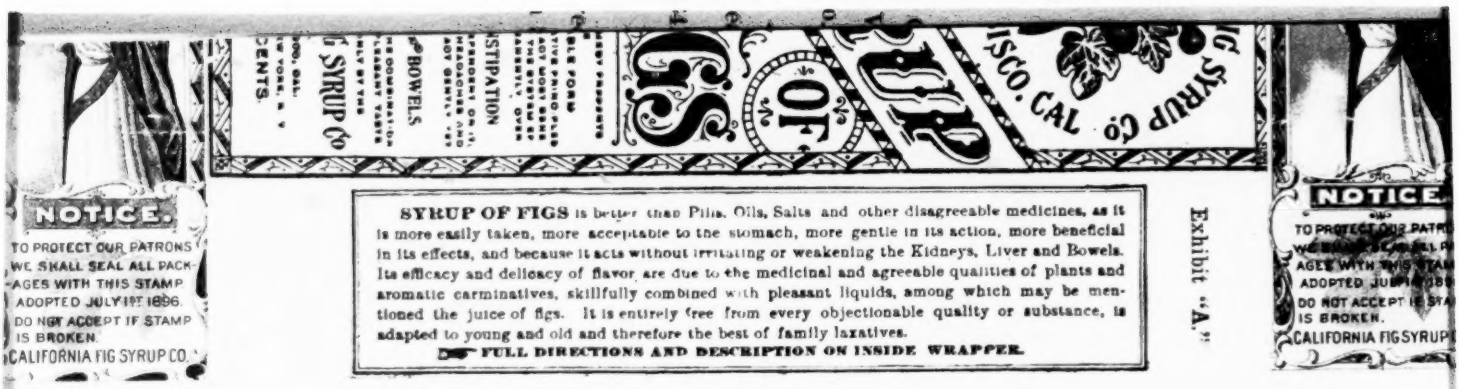
U. S. Circuit Court, N. Dist. of Cal. Cal. Fig Syrup Co. vs. Worden et al. No. 12,378. Respondent's Exhibit No. 20. E. H. H., Examiner.

Filed April 12, 1899. Southard Hoffman, Clerk, by W. B. Beaizley, Deputy Clerk.

No. 564. U. S. Circuit Court of Appeals, for the Ninth Circuit. Respondents' Exhibit No. 20.

Received Oct. 30, 1899. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

NOTICE
TO PROTECT OUR PATRONS
WE SHALL SEAL ALL PACKAGES WITH THIS STAMP
ADOPTED JULY 1ST 1896
DO NOT ACCEPT IF STAMP IS BROKEN
CALIFORNIA FIG SYRUP CO.
LE SIROP DE FIGUES excelle tous les autres remedes, et les enfants et les artulles le prennent plus facilement; dans ce qu'il agit plus agreable a l'estomac, et dans ce qu' il est plus efficace a purifier tout le corps, empechant les fievres et le mal de tete et dissipant le rhume, de sorte qu'il en resulte le sang pur, le sommeil qui rafraichit, la sante, et la viguer. Il est meilleur que l' huile, les sels, les pilules, et que tous les autres cathartiques amers et degoutants et les remedes au foie, tandis qu'il fortifie les organes sur lesquels il agit. Il est advantageux egalment a l' enfant et a la mere, a l' invalide dans son lit, et a l'homme fort et robuste, quand il est bilieux ou constipe.
Pour obtenir les instructions et directions completes, lisez l'enveloppe interieure.
EL JARABE DE HIGOS: Supera a todos los remedios, en ser el mas suave de tomar por ancianos como por jóvenes, es el mas aceptable para el Estomago, y Intestinos, apacible y prontamente en los Higados, Riñones e Fiebres Limpiando Con eficacia todo el Sistema. Previniendo Fiebres y dolores de cabeza, y desechando resfriados. Purifica la Sangre de tal modo que refresca el Sueño. llegando a alcanzar Salud y fuerza natural. Mejora a los Aceites, Sales, Pildoras y demas veverages purgativos y medicinales al Higado, pues da fuerza a los órganos donde actua, y es tan beneficioso a las Madres como a los niños, al invalido y enfermo de cama al bumbre robusto bilioso ó acosupado.
Lea el papel de dentro para mas completa direccion en las descripcion.
PEIGEN SYRUP uebertrifft alle uebrigen Heilmittel, indem derselbe sowohl fuer Kinder wie fuer Erwachsene leicht einzunehmen ist, vom Magen leicht verdaut wird, und auf Nieren, Leber und Eingeweide angenehm und schnell wirkt, das System reinigt, Fieber und Kopfschmerzen vertreibt, Erkaeltungen hebt, so dass reines Blut, erfrischender Schlaf, Gesundheit und Kraft, natuerlicherweise folgen muessen. Derselbe ist besser als Oel, Salz, Pillen und andere bittere ekelhafte und abfuehrende auf die Leber wirkende Arzneien, weil er die Organe, auf welche er wirkt, kraeftig, und ebenso heilsam ist fuer das Kind wie fuer die Mutter, fuer den Invaliden, Kranken, wie fuer den starken, robusten Mann, wenn billios oder an Verstopfung leidend.
GEBRAUCHSANWEISUNG UND BESCHREIBUNG INNERHALB DES UMSCHLAGS.
Complainant's
CALIFORNIA FIG SYRUP Co.
SAN FRANCISCO, CAL.
SYRUP OF FIGS
THIS EXCELLENT REMEDY PRESENTS IN THE MOST ACCEPTABLE FORM THE MEDICINALLY LAXATIVE PRINCIPLES OF PLANTS KNOWN TO ACT MOST GENTLY YET EFFECTUALLY TO CLEANSE THE SYSTEM EFFECTUALLY, TO PERMANENTLY OVERCOME HABITUAL CONSTIPATION AND THE MANY ILLS DEPENDENT ON IT, TO DISPEL COLDS AND HEADACHES AND PREVENT FEVERS; TO ACT GENTLY YET PROMPTLY ON THE KIDNEYS, LIVER & BOWELS
THE JUICE OF FIGS IN THE COMBINATION IS TO PROMOTE THE PLEASANT TASTE
MANUFACTURED ONLY BY THE CALIFORNIA FIG SYRUP Co
OF SAN FRANCISCO, CAL.
LOUISVILLE, KY. NEW YORK, N. Y.
PRICE, 50 CENTS.
REGISTERED IN PATENT OFFICE.
Exhibit
SYRUP OF FIGS is better than Pills, Oils, Salts and other disagreeable medicines, as it is more easily taken, more acceptable to the stomach, more gentle in its action, more beneficial in its effects, and because it acts without irritating or weakening the Kidneys, Liver and Bowels. Its efficacy and delicacy of flavor are due to the medicinal and agreeable qualities of plants and aromatic carminatives, skillfully combined with pleasant liquids, among which may be mentioned the name of the


NOTICE.
TO PROTECT OUR PATRONS WE SHALL SEAL ALL PACKAGES WITH THIS STAMP ADOPTED JULY 1ST 1896.
DO NOT ACCEPT IF STAMP IS BROKEN.
CALIFORNIA FIG SYRUP CO.
SYRUP OF FIGS
SAN FRANCISCO, CAL.
SYRUP OF FIGS
SAN FRANCISCO, CAL.
NOTICE
IS BROKEN.
CALIFORNIA FIG SYRUP

SYRUP OF FIGS is better than Pills, Oils, Salts and other disagreeable medicines, as it is more easily taken, more acceptable to the stomach, more gentle in its action, more beneficial in its effects, and because it acts without irritating or weakening the Kidneys, Liver and Bowels. Its efficacy and delicacy of flavor are due to the medicinal and agreeable qualities of plants and aromatic carminatives, skillfully combined with pleasant liquids, among which may be mentioned the juice of figs. It is entirely free from every objectionable quality or substance, is adapted to young and old and therefore the best of family laxatives.

☞ FULL DIRECTIONS AND DESCRIPTION ON INSIDE WRAPPER.

Exhibit "A."

LE SIROP DE FIGUES excelle tous les autres remèdes, et les enfants et les adultes le prenants plus facilement; dans ce qu'il est plus agréable à l'estomac, et dans ce qu'il agit plus doucement et plus promptement sur le foignon, le foie, et les boyaux. Il est plus efficace à purifier tout le corps, empêchant les fièvres et le mal de tête et dissipant le Rhume, de sorte qu'il en résulte le sang pur, le sommeil qui rafraîchit, la santé, et la vigueur. Il est meilleur que l'huile, les sels, les pilules, et que tous les autres cathartiques amers et dégoûtants et les remèdes au foie, tandis qu'il fortifie les organes sur lesquels il agit. Il est avantageux également à l'enfant et à la mère, à l'invalide dans son lit, et à l'homme fort et robuste, quand il est bilieux ou constipé.

Pour obtenir les instructions et directions complètes, lisez l'enveloppe intérieure.

SIROPE DE HIGOS: Supera á todos los remedios, en ser el mas facil de tomar por ancianos como por jóvenes, es el mas aceptable para el Estomago, todua mas apacible y fontamente en los Hígados, Riñones e Intestinos, limpiando con eficacia todo el Sistema, Previniendo Fiebres y dolores de cabeza, Neutralizando Purifica la Sangre da el sueño que refresca el Sueño, Regando á alcanzar Salud y Fuerza natural. Mejora a los Aceitos, Sales, Píldoras y demas brebages purgativos y medicinales al Higado, pues da fuerza á los organos donde actua, y es tan beneficioso á los Madres como para el niño, al invalido y enfermo de cama al hombre robusto bilioso ó acostipado.

Lean el papel de dentro para mas completa direccion en las discrepciones.

Exhibit "A."

NOTICE.
"SYRUP OF FIGS," or "CALIFORNIA FIG SYRUP," as it is frequently called, is the only remedy manufactured by the CALIFORNIA FIG SYRUP CO. and to further protect its patrons it is sold in the genuine proved style and bears the name of the CALIFORNIA FIG SYRUP CO., of San Francisco, Cal., Louisville, Ky., New York, N. Y., is printed on the box and label of every bottle.

Feigen-Syrup übertrifft alle übrigen Heilmittel, indem derselbe sowohl für Kinder wie für Erwachsene leicht einzunehmen ist, vom Magen leicht verdaut wird und auf Nieren, Leber und Eingeweide angenehm und schnell wirkt, das System reinigt, Fieber und Kopfschmerzen vertreibt, Erkältungen hebt, so daß reines Blut, erfrischender Schlaf, Gesundheit und Kraft natürlicherweise folgen müssen. Derselbe ist besser als Oel, Salz, Pillen und andere bittere, ekelhafte und abführende auf die Leber wirkende Arzneien, weil er die Organe, auf welche er wirkt, kräftigt und ebenso heilsam ist für das Kind wie für die Mutter, für den Invaliden, Kranken, wie für den starken, robusten Mann, wenn biliös oder an Verstopfung leidend.

☞ Nun lese den inneren Umschlag wegen genauer Anweisung und Beschreibung. ☜

SYRUP OF FIGS
CALIFORNIA FIG SYRUP CO. SAN FRANCISCO, CAL.
LAXATIVE AND NUTRITIOUS JUICE OF THE FIGS OF CALIFORNIA,
KIDNEYS, LIVER, STOMACH and BOWELS,
HABITUAL CONSTIPATION
CALIFORNIA FIG SYRUP CO
PRICE, 75 CENTS.

Complainant's Exhibit "B."

SYRUP OF FIGS surpasses all other remedies, in being more easily taken by young and old, more acceptable to the stomach, and in acting more gently and promptly on the Kidneys, Liver and Bowels, thereby Cleansing the System effectually, preventing Fevers and Sick-headaches and dispelling Colds, so that Pure Blood, Refreshing Sleep, Health and Strength, naturally follow. It is better than Oil, Salts, Pills and all other bitter, nauseous purgatives and Liver Medicines, as it strengthens the organs on which it acts, and is alike beneficial to the babe and the mother, the invalid, sick-a-bed, and the strong, robust man, when bilious or costive.

☞ READ INSIDE WRAPPER FOR FULL DIRECTIONS AND DESCRIPTION. ☜

Complainant's Exhibit "I."

LAXATIVE FIG SYRUP

Laxative
FIG SYRUP
A PURELY VEGETABLE COMPOUND
PLEASANT TO THE TASTE & EFFICIENT IN ACTION
IT HAS NO EQUAL FOR
CONSTIPATION, BILIOUSNESS, SICK HEADACHE
AND ALL DISEASES ARISING FROM DISORDERED
LIVER, STOMACH KIDNEYS OR BOWELS
Especially adapted to the wants of Delicate Women and Children
LAXATIVE
Fig Syrup Co.
LOS ANGELES, CAL.
New York City, N. Y.

LAXATIVE FIG SYRUP

Complainant's Exhibit "D."

SYRUP OF FIGS

SYRUP
OF
FIGS
A Combination of Harmless and Efficient Substances combined with the Delicious and Laxative Juices of the
BEST SMYRNA FIGS.
IT HAS NO EQUAL FOR
CONSTIPATION
SICK HEADACHE,
BILIOUSNESS
and all diseases arising from disordered Liver, Stomach, Kidneys, and Bowels
Especially adapted to the wants of delicate women and children.
San Diego Fig Syrup
COMPANY,
San Francisco, Cal.

SYRUP OF FIGS

CALIFORNIA FIG SYRUP

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LAXATIVE FIG SYRUP

Complainant's Exhibit "D."

SYRUP OF FIGS

SYRUP OF

FIGS

A Combination of Harmless and Efficient Substances combined with the Delicious and Laxative Juices of the

BEST SMYRNA FIGS.

IT HAS NO EQUAL FOR

CONSTIPATION

SICK HEADACHE,

BILIOUSNESS

and all diseases arising from disordered Liver, Stomach, Kidneys, and Bowels.

Especially adapted to the wants of delicate women and children.

San Diego Fig Syrup COMPANY,

San Francisco, Cal.

SYRUP OF FIGS

Complainant's Exhibit "U."

CALIFORNIA FIG SYRUP

CALIFORNIA

FIG

SYRUP

LAXATIVE • COMPOUND

It Has No Equal

PLEASANT TO THE TASTE AND EFFICIENT IN ACTION.

FOR BILIOUSNESS CONSTIPATION, SICK HEADACHE AND ALL DISEASES ARISING FROM

DISORDERED LIVER, STOMACH, KIDNEYS AND BOWELS.

Especially adapted to the wants of delicate women and children.

PREPARED BY

Yetiva Drug Co.

LOUISVILLE, KY.

CALIFORNIA FIG SYRUP

United States Circuit Court of Appeals, for the Ninth Circuit.

CLINTON E. WORDEN & CO. (a Corporation),
Appellant,
vs.
CALIFORNIA FIG SYRUP COMPANY (a Corporation),
Appellee.
No. 564.

Opinion of Circuit Court of Appeals.

Appeal from the Circuit Court of the United States for the Northern District of California.

Before Gilbert and Ross, Circuit Judges, and Hawley, District Judge.

The appeal in this case is from an interlocutory decree in a trademark case ordering an injunction, and accounting of profits. The bill alleges that in 1879 Richard E. Queen invented a medical remedy for constipation, consisting of a solution of plants known to be beneficial to the human system, and that said preparation became popular and found a ready sale; that the said Queen soon thereafter sold his invention to the complainant, the California Fig Syrup Company, the appellee herein; that this medical compound has always been marked and

named "Syrup of Figs," and has been advertised under that name, and that the complainant and its predecessors in interest were the first to designate a laxative preparation by the name "Syrup of Figs," and the first to pack and dress or mark a liquid, laxative preparation or medicine in an oblong rectangular box, with a statement of its virtues printed thereon, and having on the front thereof a representation of a branch of a fig tree bearing fruit and leaves, surrounded by the words "Fig Syrup Company" or "California Fig Syrup Company," and below thereof the words "Syrup of Figs"; that the complainant has spent large sums of money in advertising said preparation under the name of "Syrup of Figs" or "Fig Syrup," and large quantities thereof have been sold, and that the business is one of great profit; that by virtue of the premises the complainant has acquired the exclusive right to the name "Syrup of Figs" or "Fig Syrup," as applied to a liquid, laxative, medical preparation. The bill proceeds to charge that the appellant, Clinton E. Worden & Co., a corporation, has manufactured a compound in imitation of the complainant's syrup of figs, and called it by the name "Syrup of Figs," and has put up the same in bottles and packages in imitation of the complainant's bottles and packages, and that the other defendants are druggists doing business in San Francisco, and are engaged in selling the medicine so put up by the appellant. The defendants demurred to the bill on the ground that it was multifarious, and for want of equity, for the reason that the words "Syrup of Figs" were necessarily either descriptive or deceptive, and in neither event

could they form the subject matter of a lawful trademark. The demurrer was overruled, and the defendants answered, admitting that the appellant had manufactured and the other defendants had sold a liquid, laxative under the name of "Syrup of Figs"; but they denied that the complainant was entitled to relief in equity, for the reason that it had fraudulently represented the nature of its preparation, and they alleged that in fact said preparation never did contain any syrup of figs or any juice of figs, and that the name "Syrup of Figs" or "Fig Syrup" was designed and adopted with the intent to deceive the public and perpetrate a fraud upon it, by inducing it to believe that the preparation contained figs, and that by reason thereof it possessed laxative properties, and that the public has thereby been induced to believe said statements concerning the complainant's medicine, whereas in fact the said preparation consists of the well-known laxative—senna—combined with certain aromatic substances, added for the purpose of giving it a pleasant taste, and counteracting the griping effect of senna. Elaborate proofs were taken upon the issues so raised, and upon the hearing the court found that the complainant was entitled to an injunction on the ground of unfair competition in trade, for the reason that, in the opinion of the court, the form and appearance of the defendant's bottles, labels, and packages so nearly resembled those of the complainant as to constitute unfair competition in trade; and in the decree the court enjoined the defendants from using or selling or offering for sale a liquid, laxative medicine under the name of

"Syrup of Figs" or "Fig Syrup," or under any name in colorable imitation of the name "Syrup of Figs." (95 Fed. 132.)

Purcell Rowe and John H. Miller, for Appellant.

Warren Olney, for Appellee.

Before Gilbert and Ross, Circuit Judges, and Hawley, District Judge.

GILBERT, Circuit Judge, after stating the case above, delivered the opinion of the court.

The question presented in this case is whether the appellee has so fraudulently represented to the public the nature of the preparation which he has sold under the name of "Syrup of Figs"; that a court of equity may not protect him in the use of that name. We are referred to two decisions of the Circuit Courts of Appeals, which it is said answer this question in the affirmative. (California Fig Syrup Co. v. Frederick Stearns & Co., 20 C. C. A. 22, 73 Fed. 812, 33 U. S. A. 56, and Same v. Putnam, 16 C. C. A. 376, 69 Fed. 740.) It is said, moreover, that the decision of this court in the case of Improved Fig Syrup Co. v. California Fig Syrup Co., 4 C. C. A. 264, 54 Fed. 175, holding the appellee herein guiltless of any attempt to impose upon or defraud the public, was rendered upon a proposition that was not involved in the case, and that therefore the remarks of this court upon that subject are obiter, and are not authority upon the question which is now under consideration. The two decisions so cited from the Circuit Court of Appeals for the First and Sixth Circuits were based upon facts which

differ in material respects from the facts upon which the decree was rendered in the case at bar. In those cases it was shown that the appellee's fig syrup was offered to the public under the representation that it contained the laxative and nutritious juice of the figs of California, and the preparation was designated "The California Liquid Fruit Remedy," whereas in fact it was shown that there never had been in the preparation more than one-tenth of 1 per cent of the juice of figs—a quantity so small as to have no perceptible effect either medicinally or by way of flavor. The record in the present case shows that, after the decisions in those cases were rendered, the appellee made material alterations in the representations which were printed on the cartons or boxes inclosing its remedy, and in its new label eliminated the representations which had controlled the decision in the cases referred to, and that in lieu thereof it set forth the following representations:

"This excellent remedy presents in the most acceptable form the medicinally laxative principles of plants known to act most beneficially to cleanse the system effectually, to permanently overcome habitual constipation and the many ills dependent on it, etc. The juice of figs in the combination is to promote the pleasant taste."

It is by these representations so offered to the public that the rights of the appellee in the present case must be measured. It is urged that there still remains the false representation which is suggested by the name of the preparation which is thus offered for sale. It is said that the name "Syrup of Figs" is a false name; that it

declares to the public that the preparation is composed of a liquid decoction of figs; that, therefore, it is calculated to deceive the public. It is argued that, if the name does in fact properly designate the preparation, it is not susceptible of appropriation as a trademark, and that, if it does not in fact properly designate the preparation, it is deceptive, and therefore not entitled to protection in a court of equity. The appellee's medicinal preparation is not a syrup of figs. It is not made from figs, and the quantity of figs used in its preparation is so small that it must be conceded to have little, if any, perceptible effect, either in promoting the pleasant taste, or otherwise. It is shown, also, that there is known to the drug trade no such preparation as a syrup of figs, and that appellee's grantor was the first to use the name. We do not think the name "Syrup of Figs" as applied to the appellee's preparation is in itself calculated to mislead or deceive the public to any material extent. Anyone who knows enough to take medicine when he is ill must know that a liquid medicine to be taken in small doses as a laxative would be worthless for the purpose intended if it consisted of nothing more than a syrup or decoction of figs. There is in the form in which the medicine is presented, the purpose for which it is used, and the size of the dose which is prescribed, sufficient to charge him with notice that the medicine contains something more than a preparation of figs. And if, indeed, he be so uninformed and ignorant that the name "Syrup of Figs" alone conveys to him the impression that the compound is made of figs, there may be found in the car-

ton a distinct intimation to the contrary. It is there declared that the "remedy presents in the most acceptable form the medicinally laxative principles of plants known to act beneficially," and that the juice of the figs in the combination is only to promote the pleasant taste. As the name "Syrup of Figs" is so used by the complainant, it is a fanciful name only. The equities of the case are not affected either for or against the appellee by the use of the very small quantity of figs which enter into the preparation of its medicine. (Centaur Co. v. Robinson (C. C.), 91 Fed. 889; Von Mumm v. Frash (C.C.), 56 Fed. 830; Stone Co. v. Wallace (C. C.), 52 Fed. 431; Stuart v. F. G. Stewart Co., 33 C. C. A. 480, 91 Fed. 243; Societe Anonyme de la Distillerie de la Liqueur Benedictine de L' Abbaye de Fecamp v. West Distilling Co. (C. C.), 43 Fed. 416.)

It is contended that there was reversible error in the ruling of the court upon the question of the multifariousness of the bill. It is said that the bill was multifarious for the reason that it failed to charge that there was concert of action between the various defendants who sold the fig syrup which was manufactured by Clinton E. Worden & Co., and that in the absence of such an allegation the defendants could not be joined in a single suit. If the bill was indeed multifarious, it was a defect which could be waived by the defendants. We think they did so waive it by their failure to include in their assignments of error the ruling of the court upon that question. It is contended further that the portion of the decree which awards an accounting is erroneous, for the

reason that, in a suit on a common-law trademark, the complainant is not entitled to recover the defendants' profits, but only his own damages, and for the further reason that in the present case the bill contains no allegation that the defendants realized any profits. The action of the court in so decreeing an accounting of the profits is not assigned as error, and we do not consider it such plain error as to require our consideration in the absence of such assignment. The appellant suggests that the court must have adopted that portion of the decree through inadvertence. If such is the case, and the decree erroneous in that respect, we apprehend that no difficulty would be encountered in obtaining its correction upon application to the circuit court. The decree is affirmed.

ROSS, Circuit Judge, dissents.

[Endorsed]: No. 564. U. S. Circuit Court of Appeals for the Ninth Circuit. Clinton E. Worden & Co. vs. California Fig Syrup Co. Opinion filed May 21, 1900. F. D. Monckton, Clerk.

United States Circuit Court of Appeals, for the Ninth Circuit.

CLINTON E. WORDEN & CO. (a Corporation),
Appellant,
vs.
THE CALIFORNIA FIG SYRUP COMPANY (a Corporation),
Appellee.
No. 564.

Decree of Circuit Court of Appeals.

Appeal from the Circuit Court of the United States for the Northern District of California.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of California, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

[Endorsed]: Decree. Filed and entered May 21, 1900. F. D. Monckton, Clerk.

Clerk's Certificate.

United States of America,
Northern District of California. } ss.

I, F. D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that the foregoing printed transcript is a true and correct copy of the printed transcript of record and the opinion and decree of the said Court on Appeal in the case of Clinton E. Worden & Co., Appellant, vs. California Fig Syrup Company, No. 564, all appearing of record in my office.

In witness whereof I have hereunto set my hand and affixed my official seal this —— day of ————, A. D. 1900.

————————,
Clerk United States Circuit Court of Appeals for Ninth Circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Being informed that there is now pending before you a suit in which Clinton E. Worden & Co. (a corporation) is appellant and California Fig Syrup Company (a corporation) is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the northern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of November, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No., 17,967. Supreme Court of the United States No. 482, October term, 1900. Clinton E. Worden & Co. *vs.* California Fig Syrup Co. Writ of certiorari. No. 564. U. S. circuit court of appeals for the ninth circuit. Filed December 12, 1900. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

CLINTON E. WORDEN & CO., Appellants,
vs.
CALIFORNIA FIG SYRUP CO., Appellee. } No. 564.

Stipulation as to Return to Writ of Certiorari.

It is this 11th day of December, A. D. 1900, stipulated by and between the attorneys of record for the parties in the above-entitled cause that the certified transcript of the record of said cause heretofore submitted to the Supreme Court of the United States, with the petition for a writ of certiorari, may be filed in the said Supreme Court and may be received and considered by that court as the transcript of the record in said cause as though the same had been returned by the clerk of the circuit court of appeals for the ninth

circuit in obedience to the writ of certiorari granted the 29th day of November, 1900.

(Signed) JOHN H. MILLER,
Counsel for Appellants.
WARREN OLNEY,
Solicitor for Appellee.

(Endorsed:) Stipulation as to return to the writ of certiorari. Filed December 19, 1900. F. D. Monckton, clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

CLINTON E. WORDEN & Co. (a Corporation), Appellant,
vs.
THE CALIFORNIA FIG SYRUP COMPANY (a Corporation), Appellee.
No. 564.

Certificate of Clerk C. C. A. to Stipulation.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the next preceding page to be a full, true, and correct copy of a stipulation as to return to writ of certiorari filed in the above-entitled cause this nineteenth day of December, A. D. 1900, as the originat thereof remains on file in my office.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 19th day of December, A. D. 1900.

F. D. MONCKTON, *Clerk.*

{ Ten-cent United States internal revenue stamp, canceled Dec. 19, 1900. F. D. M., cl'k. }

United States Circuit Court of Appeals for the Ninth Circuit.

CLINTON E. WORDEN & Co. (a Corporation), Appellant,
vs.
THE CALIFORNIA FIG SYRUP COMPANY (a Corporation), Appellee.
No. 564.

Return to Writ of Certiorari.

By direction of the judges of the United States circuit court of appeals for the ninth circuit I, Frank D. Monckton, clerk, in obedience to the foregoing writ of certiorari issued out of the honorable the Supreme Court of the United States and addressed to the honor-

able the judges of the United States circuit court of appeals for the ninth circuit, commanding them to transmit to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said writ a certified copy of a stipulation entered into between the attorneys for the several parties in said cause on the 11th day of December, A. D. 1900, the original of which stipulation is of record in my office, and do certify the same as due return to said writ.

In testimony whereof I have hereunto set my hand and affixed the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 19th day of December, A. D. 1900.

Seal United States Circuit Court of Appeals, Ninth Circuit.

F. D. MONCKTON, *Clerk.*

{ Ten-cent United States internal-revenue stamp, canceled Dec. 19, 1900. F. D. M., cl'k. }

[Endorsed:] File No., 17,967. Supreme Court U. S., October term, 1901. Term No., 192. C. E. Worden & Co., petitioner, *vs.* California Fig Syrup Company. Writ of certiorari and return. Filed Jan'y 7, 1901.

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JAMES H. MCKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900. 1901

No. 182 1900 36.

CLINTON E. WORDEN & CO.,
Petitioners,

vs.

CALIFORNIA FIG SYRUP COMPANY.

PETITION FOR WRIT OF CERTIORARI.

JOHN H. MILLER,
Counsel for Petitioners.

Pilgrim-Baker Co. Print, 49 Sansome St., S. F.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

CLINTON E. WORDEN & CO. (a Corporation),

Petitioner,

vs.

CALIFORNIA FIG SYRUP COMPANY (a Corporation).

PETITION

Of Clinton E. Worden & Co. (a Corporation) for a Writ of Certiorari, requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court of the United States for its review and determination the case of Clinton E. Worden & Co. et al., Appellants, vs. California Fig Syrup Company (a Corporation), Appellee, under the provisions of section 6 of an act to establish Circuit Courts of Appeal, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes, approved March 3, 1895.

To the Honorable the Supreme Court of the United States:

The petition of Clinton E. Worden & Co., a corporation, respectfully shows to this Honorable Court as follows:

1. That at all the times hereinafter mentioned, your petitioner Clinton E. Worden & Co. was and is a corporation created under the laws of the State of California and having its principal place of business at the city and county of San Francisco in the State of California; that at all said times the appellee, the California Fig Syrup Company, was and is a corporation created under the laws of the State of Nevada.

2. That heretofore, to wit, on June 1, A. D. 1897, the said California Fig Syrup Company filed its bill in equity against your petitioners in the Circuit Court of the United States for the Northern District of California, wherein it was alleged that for many years prior thereto said California Fig Syrup Company had manufactured and sold a certain liquid laxative medical compound under and by the name of "Syrup of Figs" or "Fig Syrup"; that said name had been adopted and appropriated by the said California Fig Syrup Company as a trademark for said medicine, and the same had been extensively used for that purpose, whereby the said California Fig Syrup Company had become entitled to hold and use the said words as a trademark for said medicine; further alleging that your petitioners had infringed upon the asserted right of the California Fig Syrup Company under said trademark by manufacturing and selling a liquid laxative medical compound under the name "Syrup of Figs" or "Fig Syrup," thereby injuring and damaging the said California Fig Syrup Company and interfering with its trade, and said bill prayed that an injunction be granted against your petitioners enjoining

and restraining them from making, selling, or offering for sale any liquid, laxative preparation under the name "Syrup of Figs" or "Fig Syrup," or under any name in colorable imitation thereof, and from making, selling, or offering for sale any liquid, laxative medical preparation put up in bottles, boxes, or packages so similar in form and appearance to those used by the California Fig Syrup Company as to be calculated to deceive the public, and for various and sundry other forms of relief, including an accounting of the gains, profits, and advantages alleged to have been realized by your petitioners from the sale of their medicine under said name.

3. That your petitioners duly appeared in said case by their solicitors, and on April 14, A. D. 1898, filed their answer to the bill of complaint, denying, among other things, that the California Fig Syrup Company had any right, title, or property in and to said words "Syrup of Figs" or "Fig Syrup" as a trademark, on the ground and for the reason that the said medicine contained no appreciable quantity of figs or the juice or syrup of the figs, and was, therefore, deceptive and fraudulent, and an imposition upon the public, and that said words could not lawfully be appropriated as a trademark, and that the asserted and alleged trademark therein was utterly void and of no effect.

4. That thereafter, to wit, on May 2, A. D. 1898, a replication to said answer was duly filed, and the case being thus at issue, voluminous proofs were taken by both sides, and after a final hearing thereon, to wit, on June 7, 1899, an interlocutory decree was made and en-

tered in said case by the Circuit Court of the United States for the Northern District of California, wherein, among other things, it was ordered, adjudged, and decreed that the words "Syrup of Figs" or "Fig Syrup" as applied to a liquid, laxative medical compound by the California Fig Syrup Company, was a good and valid trademark and was the property of the California Fig Syrup Company, and that no other person had any right or authority to use said words in connection with a liquid, laxative medical compound without the consent of the said California Fig Syrup Company, and it was further ordered, adjudged, and decreed that a perpetual injunction be issued out of and under the seal of the court enjoining and restraining your petitioners and each of them, their agents, clerks, and workmen, from making, manufacturing, or using, or selling, or offering for sale, or in any way disposing of a liquid, laxative medicine or preparation under the name "Syrup of Figs" or "Fig Syrup," or under any name in colorable imitation thereof, and from making, selling, or offering for sale any medical, liquid, laxative preparation put up in bottles, boxes, or packages similar in form and arrangement to those used by the California Fig Syrup Company, or so closely resembling the same as to be calculated to deceive the public, and also from using the name "Fig Syrup Company" or any name whereof the words "Fig Syrup" or "Syrup of Figs Company" form a part as a business name in connection with the manufacture of a liquid, laxative preparation, and it was further decreed that your petitioners account for damages and

profits and costs of suit, the same to be ascertained on a reference to the standing master of the Court.

5. That thereafter, in due and proper season, an appeal was prosecuted by your petitioners to the Circuit Court of Appeals for the Ninth Circuit from the said interlocutory decree, and all necessary and proper steps were taken for the prosecution of said appeal, and the hearing of the same.

6. That in due and proper season said appeal came on to be heard and the same was heard by the said Circuit Court of Appeals for the Ninth Circuit, and after a hearing thereof, to wit, on May 21, A. D. 1900, the interlocutory decree appealed from was affirmed by said Circuit Court of Appeals, and a decree to that effect was thereupon entered; that the Judges presiding at the hearing of said case and participating in the decision were the Circuit Judges, Honorable W. B. Gilbert and the Honorable Erskine M. Ross, and the District Judge, Honorable Thomas P. Hawley; that the Honorable Erskine M. Ross, Circuit Judge, dissented from the opinion and decree of said Circuit Court of Appeals, and the affirmance of the decree appealed from was effected by the votes of the other two judges; that the opinion of said Circuit Court of Appeals in said case is found reported in volume 102 of the Federal Reporter, between pages 334 and 338.

7. That a true and correct transcript of the record on appeal in said case, together with a copy of the decree of the said Circuit Court of Appeals affirming the decree appealed from, and also a copy of the opinion of said

Circuit Court of Appeals rendered thereon are herewith produced and filed in this court.

8. And your petitioners further show unto your Honors that heretofore, to wit, on March 6, 1895, there was pending in the Circuit Court of the United States for the District of Massachusetts a suit in equity, wherein this same California Fig Syrup Company was the complainant and one Putnum was the defendant; the object of the said suit was the same as the object of the suit of the California Fig Syrup Company against your petitioners, to wit, to obtain an adjudication that the words "Syrup of Figs" and "Fig Syrup" as applied to a liquid, laxative medicine was a good and valid trademark, that the California Fig Syrup Company was the owner thereof, and that an injunction be issued against the defendants from infringing upon the same; that said suit against Putnum came on regularly to be heard before his Honor Judge Colt in the United States Circuit Court for the District of Massachusetts, and on March 6, 1895, a decree was entered therein wherein it was adjudged and decreed that the said words "Syrup of Figs" and "Fig Syrup" did not and could not under the law constitute a valid trademark as applied to said liquid, laxative medical compound, in that the said compound contained no appreciable quantity of fig juice, and was, therefore, deceptive and fraudulent; that the opinion of his Honor Judge Colt in that case is reported in volume 66 of the Federal Reporter at page 750; and thereupon the bill of complaint was ordered dismissed and a decree to that effect entered accordingly; that thereafter an appeal from said

decree was duly prosecuted by said California Fig Syrup Company to the Circuit Court of Appeals for the First Circuit, where the same was heard by that court, consisting of their Honors Judges Putnum, Nelson, and Aldrich, and the decree was affirmed, the opinion affirming said decree being reported in volume 69 of the Federal Reporter, at page 741.

9. And your petitioners further show unto your Honors that heretofore, to wit, on April 1, 1895, there was pending in the Circuit Court of the United States for the Eastern District of Michigan a suit in equity wherein this same California Fig Syrup Company was complainant and one Stearns was defendant. that the object of said suit was identically the same as the object of the suit against your petitioners, to wit, to establish the validity of the words "Syrup of Figs" and "Fig Syrup" as a valid trademark applied to a liquid, laxative, medical compound and to enjoin the infringement thereof; that after a full trial of the case and an exhaustive hearing by his Honor Judge Swan, it was ordered, adjudged, and decreed that the said words were not a valid trademark, in that the same were fraudulent and deceptive, and thereupon the bill of complaint was dismissed with costs; that the California Fig Syrup Company duly appealed from said decree to the Circuit Court of Appeals of the Sixth Circuit, and after a full hearing by that court before their Honors Judges Taft, Lurton, and Hammond, the decree appealed from was affirmed.

10. That by reason of the premises it is the established law in the First Circuit and in the Sixth Circuit that the

words "Syrup of Figs" and "Fig Syrup" as applied to a liquid, laxative, medical compound by the California Fig Syrup Company is deceptive and fraudulent, and for that reason not a valid trademark, and no one can be enjoined from using it, but by the decision of the Court of Appeals for the Ninth Circuit directly the opposite rule of law has been established, and your petitioners have been enjoined from using the said words in connection with a liquid, laxative, medical compound, and your petitioners therefore show, as reasons why the writ herein asked for should be granted, that the question is one of gravity and importance within the ruling of this court in the case of Lau Ow Bew, 141 U. S. 587, and other kindred decisions of this court, and that the question has been differently decided on substantially the same state of facts by different Circuit Courts of Appeals of the United States, to wit, by the Circuit Court of Appeals for the First and Sixth Circuits against the validity of the trademark, and by the Circuit Court of Appeals of the Ninth Circuit in favor of its validity, and therefore a ruling of this court is desired in the interest of uniformity of decision within the ruling of this court in the case of Lau Ow Bew aforesaid, and also in the cases of In re Wood, 143 U. S. 202 American Construction Co. vs. Jacksonville Ry. Co., 148 U. S. 372, and many other kindred cases.

11. That the questions on which a ruling of this court is desired are as follows: (1) Are the words "Syrup of Figs" or "Fig Syrup," when applied to a liquid, laxative, medical compound which contains no appreciable quantity of figs or fig juice, misleading and deceptive? (2) Can

the words "Syrup of Figs" or "Fig Syrup" be lawfully appropriated as a trademark for a liquid laxative medical compound which contains no appreciable quantity of figs or fig juice? (3) Are the words "Syrup of Figs" or "Fig Syrup," when used upon a medicinal preparation to be taken in small doses, and when accompanied by descriptive matter printed upon the package indicating that the medicinal properties claimed for the remedy are not derived from figs, but from the laxative principles of plants known to act most beneficially, calculated to mislead and deceive purchasers to such an extent as to deprive the manufacturer of the right to protection in the exclusive use of said names as a fanciful designation of his product, it being shown that such product in fact contains so little fig juice as to have no appreciable effect either medicinally or otherwise, and that no such preparation as "Syrup of Figs" is known to the drug trade? (4) Which of the conflicting decisions of the different circuits is correct—that of the Court of Appeals of the Ninth Circuit, holding that the words "Syrup of Figs" or "Fig Syrup" are a lawful trademark, or that of the Court of Appeals for the First Circuit and Sixth Circuit holding to the contrary? (5) Is the decree of the United States Circuit Court of Appeals for the Ninth Circuit affirming the decree of the United States Circuit Court for the Northern District of California, granting a perpetual injunction against Clinton E. Worden & Co. from making, using, selling, or offering for sale a liquid, laxative, medicine under the name "Syrup of Figs" or "Fig Syrup," good and sound in law?

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals of the United States for the Ninth Circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all the proceedings of the said Circuit Court of Appeals in the case of Clinton E. Worden & Co. et al., Appellants, vs. California Fig Syrup Company, a Corporation, Appellee, No. 564, as identified by the transcript of the record, to the end that the said case may be reviewed and determined by this court as provided by section 6 of the act of Congress entitled "An act to establish Circuit Courts of Appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891; and that your petitioners may have such other and further relief and remedy in the premises as to this Court may seem meet and appropriate and in comformity with the said act; and that the said decree of the said Circuit Court of Appeals of the Ninth Circuit in the said case be reversed, and the said suit against your petitioners be ordered dismissed with judgment for their costs.

And your petitioners will ever pray, etc.

CLINTON E. WORDEN & Co.
By CLINTON E. WORDEN,
President.

JOHN H. MILLER,
Solicitor and Counsel for Petitioners.

United States of America,
Northern District of California. } ss.

John H. Miller, being duly sworn, says that he is the solicitor and counsel for the petitioners above named, and as such has had personal charge for said petitioners of the case in the foregoing petition mentioned in the Circuit Court of the United States for the Northern District of California, and in the Circuit Court of Appeals of the United States, for the Ninth Circuit; that he has read the said petition and knows the contents thereof, and that the facts therein stated are true to the best of his information and belief.

JOHN H. MILLER.

Subscribed and sworn to before me this 22nd day of Oct., 1900. F. D. Monckton
Clerk U.S. Circuit Court of Appeals for the Ninth Circuit.

Certificate of Counsel.

I hereby certify that I am the counsel for petitioners in the foregoing petition; that I have carefully examined the said petition on application for a writ of certiorari, and that, in my opinion, the same is well founded, and the case is one in which the prayer of the petitioner should be granted by this court.

JOHN H. MILLER,
Counsel for Petitioners.

Notice.

To Warren Olney, Esq., Counsel for California Fig Syrup Company:

Take notice that on Monday, the 12 day of November A. D. 1900, on the opening of court, or as soon thereafter as the matter can be heard, I shall move the Supreme Court of the United States, at the courtroom thereof in the city of Washington and the District of Columbia, that the foregoing petition for a writ of certiorari be granted.

Dated at San Francisco this 22nd day of Oct., A. D. 1900.

JOHN H. MILLER,
Counsel for Petitioners.

Copy of the foregoing petition and of the record admitted at San Francisco, Oct. 22, 19

Warren Olney
Counsel for Appellee

No. 482.

Brf. of Miller for Petitioner.

Office Supreme Court, U.S.
FILED
NOV 12 1900
JAMES H. McKENNEY,
Clerk.

Filed Nov. 12, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 482

CLINTON E. WORDEN & COMPANY,
Petitioner,

vs.

CALIFORNIA FIG SYRUP COMPANY.

PRELIMINARY BRIEF OF PETITIONER

On Application for Writ of Certiorari.

JOHN H. MILLER AND
PURCELL ROWE,
Counsel for Petitioner.

FILMER-ROLLINS CO. PRINT, 424 Sansome St., S. F.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

CLINTON E. WORDEN & CO.,
Appellant and Petitioner,

vs.

CALIFORNIA FIG SYRUP CO.,
Appellee.

PRELIMINARY BRIEF FOR PETITIONER.

THE FACTS.

This is an application, under section 6 of the Circuit Court of Appeals Act, praying for the issuance of a writ of *certiorari* requiring the Circuit Court of Appeals for the Ninth Circuit to certify to this court for review the case of *Clinton E. Worden & Co., Appellant*, vs. *California Fig Syrup Co., Appellee.*

The California Fig Syrup Co. is a corporation created under the laws of Nevada, and Clinton E. Worden & Co. is a corporation created under the laws of California.

The suit was brought by the appellee in the United States Circuit Court for the Northern District of California against the appellant and certain other parties who were joined with the appellant as defendants.

The object of the suit was to restrain the infringement of a common-law trade-mark consisting of the words "Syrup of Figs" or "Fig Syrup" as applied to a liquid laxative medicine, and also to enjoin the use of certain alleged simulated labels and wrappers, together with an accounting of profits.

The bill of complaint alleged that in 1879 one Richard E. Queen invented a liquid laxative preparation, which consisted of "a combination, in solution, of plants known to be beneficial to the human system, forming an agreeable and effective laxative, to cure habitual constipation and the many ills dependent upon an inactive condition of the liver, kidneys, stomach and bowels," which said remedy, it is alleged, became popular with the public at large and ever since has been sold in great quantities.

It was further alleged that the said Queen adopted as a trade-mark for this medicine the words "Syrup of Figs" or "Fig Syrup," by which name the medicine has always been known; and also that he put up the medicine in a certain style of bottles and wrapped it with a certain label which gave it a distinctive appearance.

This trade-mark, together with the label and the good will of the business, was sold by Mr. Queen to the appellee, a corporation styled "The California Fig Syrup Company," which corporation has ever since been selling the medicine under the said name.

The usual charge of infringement was then made, alleging that the appellant had sold a similar medicine, but of inferior composition, under the name "Syrup of Figs" and "Fig Syrup," put up in bottles and dressed in

labels and wrappers so closely resembling those of the appellee as to deceive the public.

The prayer of the bill was for an injunction to restrain the appellant,

First.—From infringing upon the trade-mark by selling a liquid laxative medicine under the name "Syrup of Figs" or "Fig Syrup."

Second.—From unfair competition in trade by the use of simulated labels and wrappers so closely resembling those of the appellee as to deceive the public, and also from using the words "Fig Syrup Company" as a business name, or any name containing the words "Fig Syrup" or "Syrup of Figs."

In other words, the object of the suit was twofold, viz., to enjoin the infringement of a trade-mark pure and simple and to enjoin unfair competition in trade by reason of simulated labels and wrappers.

The appellee based its cause of action solely upon its common-law rights, no registration of any kind being alleged or relied on, and the ground of jurisdiction in the federal courts was diverse citizenship of the parties.

A preliminary injunction was granted in the case in advance of the final hearing, and is reported in 86 Fed. Rep. 212.

After a final hearing on elaborate proofs the court made an interlocutory decree in favor of the appellee, whereby the appellants were enjoined—

First.—From using the word "Syrup of Figs" and "Fig Syrup" as a trade-mark for a liquid laxative medical compound.

Second.—From simulating the boxes, packages, labels, wrappers, etc., of appellee.

Third.—From using the name "Fig Syrup Company" as a business designation.

The opinion of the lower court will be found reported in 95 Fed. Rep. 132, and the decree rendered will be found at page 574 of the record.

An appeal was prosecuted by the appellant from this decree to the Circuit Court of Appeals for the Ninth Circuit, and after a hearing before that tribunal, said decree was affirmed.

The judges presiding in the Court of Appeals were the Honorables W. B. Gilbert and Erskine M. Ross, Circuit Judges, and Hon. Thomas P. Hawley, District Judge. The decree was affirmed by the votes of Judges Gilbert and Hawley. Judge Ross dissented. This decree will be found at page 645 of the record. The opinion of the Court of Appeals will be found at page 637 of the record and also in 102 Fed. Rep., page 336.

Application is now made to this court for the issuance of the writ of *certiorari*, under section 6 of Circuit Court of Appeals Act, requiring the Court of Appeals for the Ninth Circuit to certify the said case to this Court for review and determination.

The ground of the application is conflict of decision between the different circuit courts of appeal upon the question involved here.

The questions upon which a ruling of this court is desired have been stated by us in the petition as follows:

1. Are the words "Syrup of Figs" and "Fig Syrup," when applied to a liquid, laxative, medical compound, which contains no appreciable quantity of figs or fig juice, misleading or deceptive?

2. Can the words "Syrup of Figs" or "Fig Syrup" be lawfully appropriated as a trade-mark for a liquid laxative medical compound which contains no appreciable quantity of figs or fig juice?

3. Are the words "Syrup of Figs" or "Fig Syrup," when used upon a medicinal preparation to be taken in small doses, and when accompanied by descriptive matter printed upon the package indicating that the medicinal properties claimed for the remedy are not derived from figs, but from the laxative principles of plants known to act most beneficially, calculated to mislead and deceive purchasers to such an extent as to deprive the manufacturer of the right to protection in the exclusive use of said names as a fanciful designation of his product, it being shown that such product in fact contains so little fig juice as to have no appreciable effect, either medicinally or otherwise, and that no such preparation as "Syrup of Figs" is known to the drug trade?

4. Which of the conflicting decisions of the different circuits is correct—that of the Court of Appeals of the Ninth Circuit, holding that the words "Syrup of Figs" or "Fig Syrup" are a lawful trade-mark, or that of the Court of Appeals for the First Circuit and Sixth Circuit holding to the contrary?

5. Is the decree of the United States Court of Appeals for the Ninth Circuit affirming the decree of the United States Circuit Court for the Northern District of California, granting a perpetual injunction against Clinton E. Worden & Co., from making, using, selling, or offering for sale a liquid, laxative medicine under the name of "Syrup of Figs" or "Fig Syrup," good and sound in law?

Put into compact form the controverted question may be stated as follows:

Can the words "Syrup of Figs" be lawfully appropriated as a trade-mark for a laxative medicine which is in fact not a syrup of figs, and not made from figs, but is made from senna and aromatics?

So far as the question of simulation of labels and wrappers is concerned, we care nothing, because that is a matter which can be very easily remedied. The fundamental question which we desire a decision on is the asserted right of the appellee to the words "Syrup of Figs" or "Fig Syrup" as a trade-mark for its medicine, without regard to the character of labels or wrappers upon which it is used, when it is admitted that the medicine has no appreciable quantity of figs or fig juice in it. The appellee asserts that it has a common-law right to those words as applied to its medicine under any and all circumstances, whether the medicine be sold by the aid of labels and wrappers, with the words printed thereon, in their own peculiar style, form, and appearance, or whether the medicine be sold in demi-johns and barrels without any labels and wrappers whatever, providing it is sold by the name "Syrup of Figs" or "Fig Syrup."

This broad contention we most earnestly and emphatically deny, and in support of our contention we assert that the Circuit Courts of Appeals of the First Circuit and of the Sixth Circuit have decided the proposition according to our contention in suits brought by this same California Fig Syrup Company against other infringers. On the other hand the Circuit Court of Appeals for the Ninth Circuit has by the vote of two of its judges, against the dissent of the third, reached an opposite conclusion.

Thus a square conflict has arisen between the two eastern Circuit Courts of Appeals on the one hand and the Western Circuit Court of Appeals on the other. Therefore, in the interest of justice and uniformity of decision to the end that the laws of the United States may be administered uniformly throughout the different states, we make this application for a writ of *certiorari*.

ARGUMENT.

I.

The writ of certiorari is grantable in cases where there is a conflict of decision between two Circuit Courts of Appeal on the same proposition of law.

As we read the decisions of this court there are two general cases in which this writ, so often asked for but so seldom granted, will issue, viz: (1) Cases of peculiar gravity and general importance; (2) Where its issuance is proper in the interest of uniformity of decision.

Instances of the first class may be found in the case of *Law Ow Bew*, 141 U. S. 583, involving a case of international law, and in the case of *In re Fabre*, petitioner, No. 1237 of the October term, 1892, involving important questions as to the rules of navigation.

Instances where this writ was granted in cases of conflict of decision are furnished by *Smith v. Vulcan Iron Works*, and *Norton v. Wheaton*, 165 U. S. 518. In these two cases this court granted the writ because there was a conflict of decision between the Court of Appeals for the Ninth Circuit, and the Court of Appeals of an Eastern Circuit on a question of patent law.

Other cases which may be consulted in this connection are *American Construction Company v. Jacksonville Railroad Company*, 148 U. S. 383; *In re Woods*, 143 U. S. 206.

II.

The facts of this case bring it within the decisions cited above, and show that the writ should issue in the interest of uniformity of decision, because there is a conflict among different Circuit Courts of Appeal on the question of law involved.

At least two circuit courts and two circuit courts of appeal have decided that the words "Syrup of Figs" or "Fig Syrup," as applied by the California Fig Syrup Company to its medicine, cannot be appropriated as a trade-mark. These adjudications proceed on the common sense proposition that the words are either descriptive or else deceptive. If the stuff is really a syrup made from figs, then the words are clearly descriptive. If, on the other hand, it contains no syrup or juice of the fig, or such an infinitesimal amount as to give it no effect, then the words are deceptive and a fraudulent imposition on the public. In neither event can they be lawfully appropriated as a trade-mark.

The first decision rendered in the eastern circuits was that of *California Fig Syrup Company vs. Putnum* (66 Fed. Rep. 750), decided by Judge Colt in the Circuit Court for the District of Massachusetts on March 6, 1895. In deciding the case Judge Colt said:

"If this preparation is in fact a syrup of figs, the words are clearly descriptive, and not the proper subject of a

trade-mark. Upon this point the contention of the plaintiff is that its preparation is not a syrup of figs, since it contains only a very small percentage of the juice of the fig; that the laxative ingredient in it is senna; that while the fig in the form of fruit may have laxative properties arising from the seeds and skin, the fig in the form of a syrup is no more laxative than any other fruit syrup; that it follows from these facts that these words as applied to this compound are not descriptive, but purely fanciful, and therefore constitute a valid trade-mark. The evidence shows that the compound is not a syrup of figs. It might more properly be termed syrup of senna, if the words were intended to be descriptive of the article. But assuming that this is not a syrup of figs, we are met with the inquiry whether these words as applied to this preparation are not deceptive."

The learned judge then proceeds to reproduce in his opinion the familiar cut of the California Fig Syrup Company, consisting of a young lady holding a fig branch in her hand, and quotes from the label used in connection therewith. He then continues his opinion as follows:

"The popularity of this medicine arises from the belief in the minds of the ordinary purchaser that he is buying a laxative compound, the essential ingredient of which is the California fig, whereas, in fact, he is buying a medicine the active property of which is senna. The ethical principle on which the law of trade-marks is based will not permit of any such deception. It may be true, as a scientific fact known to physicians and pharmacists, that the syrup of figs has little or no laxative properties; but this is not the belief of the general public. They purchase this preparation on the faith that it is a laxative compound made from the fruit of the fig,

which is false. This is not an immaterial representation, the effect of which is harmless, but it is a representation which goes to the very essence of the plaintiff's right to a trade-mark in these words. The cases are numerous where the courts have refused to grant relief under these circumstances."

Many of the leading cases are then cited in the opinion, and copious quotations taken therefrom, upon the strength of which authorities the bill was dismissed.

An appeal was taken by the California Fig Syrup Co. in that case to the Circuit Court of Appeals, where the judgment was affirmed by Judges Putnum, Nelson, and Aldrich. The opinion is very short and reads as follows:

"Per CURIAM. We agree with the reasoning and the conclusions of the Circuit Court in this cause, but we do not wish to be understood to approve all the cases cited in its opinion. It is sufficient to refer to Medicine Co. vs. Wood, 108 U. S. 218, and to the underlying principles of Church vs. Proctor, 13 C. C. A. 426, 66 Fed. 240, decided by this court February 2, 1895, as supporting the line of reasoning found in that opinion. The decree of the Circuit Court is affirmed."

California Fig Syrup Co. vs. Putnum, 69 Fed. Rep. 741.

The next case is that of *California Fig Syrup Company vs. Stearns*, 67 Fed. Rep. 1008, decided by District Judge Swan, of the Eastern District of Michigan, on April 1, 1895. It is there said:

"It is apparent from these facts that if the equities of the parties are dependent upon the quantity of fig juice

which enters into their respective preparations, they largely preponderate in favor of defendant. It is equally apparent that complainant makes and sells its wares to the public under the representation that the active and controlling ingredient is derived from the fig, while in fact, under its own proofs, the juice of that fruit has no medicinal value and is lacking in the potency required for a laxative. . . . . The relief prayed by complainant is in truth the privilege of selling its preparation of senna under the name of "Fig Syrup." Whatever the virtues or popularity of complainant's specific, there is no ground on which such relief can be granted."

Consequently, the bill was dismissed. The case was appealed to the Circuit Court of Appeals, and will be found reported in 73 Fed. Rep. 813, where it was affirmed by Judges Taft, Lurton, and Hammond in April, 1896. The opinion was rendered by Judge Taft, and amongst other things he says:

"It may be that no one had ever made a syrup of figs at the time that Queen selected the term to designate the preparation which he put upon the market. That is immaterial. It is entirely possible to describe something by the use of common words which may never have had a commercial use, or which may never have been in fact made. . . . . It is manifest that the term 'Syrup of Figs' used to describe the medical preparation, has a distinct and definite meaning, namely, a combination of sugar and the juice of the fig, and possibly other ingredients, in which, however, the medicinal property of the fig is the active and chief element. . . . . The term 'Syrup of Figs,' therefore, cannot be used as a trade-mark. . . . . But the second ground presented, and that upon which the court below rested its decision, prevents the com-

plainant from having any relief at all. That ground is that the complainant has built up its business and made it valuable by an intentional deceit of the public. It has intended the public to understand that the preparation which it sells has, as an important medicinal agent in its composition, the juice of California figs. This has undoubtedly led the public into the purchase of the preparation. The statement is wholly untrue. Just a suspicion of fig juice has been put into the preparation, not for the purpose of changing its medicinal character, or even its flavor, but merely to give a weak support to the statement that the article sold is syrup of figs. This is a fraud upon the public. It is true it may be a harmless humbug to palm off upon the public as syrup of figs what is syrup of senna, but it is, nevertheless, of such a character that a court of equity will not encourage it by extending any relief to the person who seeks to protect a business which as grown out of, and is dependent upon, such deceit. It is well settled that if a person wishes his trade-mark to be protected by a court of equity, he must come into court with clean hands, and if it appears that the trade-mark for which he seeks protection is itself a misrepresentation to the public, and has acquired a value with the public by fraudulent misrepresentation in advertisements, all relief will be denied to him. This is the doctrine of the highest court of England, and no court has laid it down with any greater stringency than the Supreme Court of the United States. . . . . The argument for complainant is that because fig juice or syrup has no laxative property, everybody ought to understand that when the term is used to designate a laxative medicine it must have only a fanciful meaning. But the fact is admitted that the public believes that fig juice or syrup has laxative medicinal properties. It is to them that the complainant seeks to sell its preparation, and

it is with respect to their knowledge and impressions that the character, whether descriptive or fanciful, of the term used, is to be determined. Exactly this question raised against the same complainant was considered by the circuit court for the district of Massachusetts (Syrup Co. vs. Putnum, 66 Fed. 750), and relief was denied by Judge Colt to the complainant on the ground that its use of the term 'Syrup of Figs' was a misrepresentation to the public, and a fraud upon it. The case was carried to the Court of Appeals, and affirmed upon the opinion of the Circuit Judge."

We thus see that in two circuit courts and in two circuit courts of appeal, and by eight different judges, the views which we have advanced concerning this trade-mark have been sustained, and that this same complainant was not entitled in those circuits to maintain a suit on the same.

The decision of the Court of Appeals for the Ninth Circuit in the case at bar is squarely in conflict with the above cited cases. Said Circuit Court of Appeals for the Ninth Circuit holds that the words "Syrup of Figs" or "Fig Syrup" can be lawfully appropriated as a trade-mark for this medicine because the words are neither descriptive nor deceptive. In rendering the decision they say:

"It is said that the name 'Syrup of Figs' is a false name; that it declares to the public that the preparation is composed of a liquid decoction of figs; that, therefore, it is calculated to deceive the public. It is argued that, if the name does in fact properly designate the preparation, it is not susceptible of appropriation as a trade-mark, and that, if it does not in fact properly desig-

nate the preparation, it is deceptive, and therefore not entitled to protection in a court of equity. *The appellee's medicinal preparation is not a syrup of figs. It is not made from figs, and the quantity of figs used in its preparation is so small that it must be considered to have little, if any, perceptible effect, either in promoting the pleasant taste or otherwise.*

It is shown also that there is known to the drug trade no such preparation as a syrup of figs and that appellee's grantor was the first to use the name. We do not think the name "Syrup of Figs" as applied to the appellee's preparation is in itself calculated to mislead or deceive the public to any material extent. Anyone who knows enough to take medicine when he is ill, must know that a liquid medicine to be taken in small doses as a laxative would be worthless for the purpose intended if it consisted of nothing more than a syrup or decoction of figs. There is in the form in which the medicine is presented, the purpose for which it is used, and the size of the dose which is prescribed, sufficient to charge him with notice that the medicine contains something more than a preparation of figs. And if indeed he be so uninformed and ignorant that the name 'Syrup of Figs' alone conveys to him the impression that the compound is made of figs, there may be found in the carton a distinct intimation to the contrary. It is there declared that the 'remedy presents, in the most acceptable form, the medicinal laxative principles of plants known to act beneficially,' and that the juice of the figs in the combination is only to promote the pleasant taste. As the name 'Syrup of Figs' is so used by the complainant it is a fanciful name only. The equities of the case are not affected either for nor against the appellee by the use of the very small quantity of figs which enter into the preparation of its medicine."

Clinton E. Worden & Co. vs. California Fig Syrup Co.,
102 Fed. Rep., p. 334.

Beyond all cavil this decision of the Court of Appeals for the Ninth Circuit is squarely in conflict with the decisions in the two eastern circuits cited.

It is claimed, however, that the eastern cases presented a different state of facts from the California case. But this alleged difference is more fanciful than real, as will be readily seen by reference to the cases themselves. On the adjoining page will be found a fac-simile of the carton used by the California Fig Syrup Company when the eastern suits were brought and which constituted the foundation for those cases. By glancing at that label, on page 16, it will be seen that it is there stated that,

"Syrup of Figs presents in the most elegant form the laxative and nutritious juice of the figs of California, combined with the medicinal virtues of plants known to be most beneficial to the human system, forming an agreeable and effective laxative to permanently cure habitual constipation and the many ills depending on a weak and inactive condition of the kidneys, liver, stomach, and bowels."

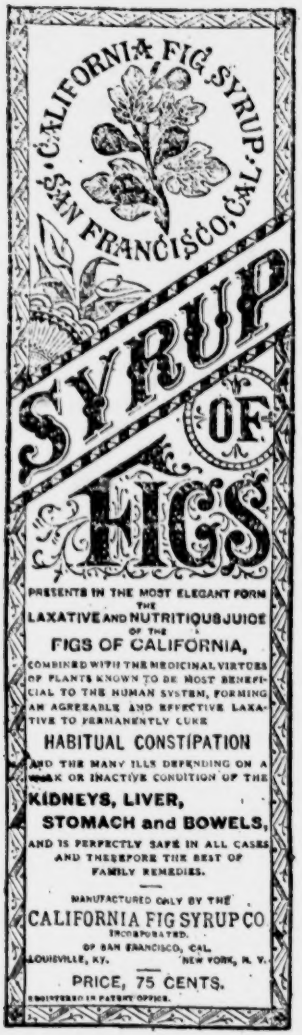
It further appears from the record that upon another label, pasted directly on the bottle enclosed in the carton, appeared the following statement:

"SYRUP OF FIGS.

The California liquid fruit remedy.

Gentle and effective."

OLD LABEL.


CALIFORNIA FIG SYRUP CAL.
SAN FRANCISCO, CAL.
SYRUP
OF
FIGS
PRESENTS IN THE MOST ELEGANT FORM THE
LAXATIVE AND NUTRITIOUS JUICE OF THE
FIGS OF CALIFORNIA,
COMBINED WITH THE MEDICINAL VIRTUES OF PLANTS KNOWN TO BE MOST BENEFICIAL TO THE HUMAN SYSTEM, FORMING AN AGREEABLE AND EFFECTIVE LAXATIVE TO PERMANENTLY CURE
HABITUAL CONSTIPATION
AND THE MANY ILLS DEPENDING ON A WEAK OR INACTIVE CONDITION OF THE
KIDNEYS, LIVER,
STOMACH and BOWELS,
AND IS PERFECTLY SAFE IN ALL CASES AND THEREFORE THE BEST OF FAMILY REMEDIES.
MANUFACTURED ONLY BY THE
CALIFORNIA FIG SYRUP CO
INCORPORATED.
OF SAN FRANCISCO, CAL.
LOUISVILLE, KY. NEW YORK, N. Y.
PRICE, 75 CENTS.
REGISTERED IN PATENT OFFICE.

After the appellee was defeated in its eastern cases, the above-quoted words were erased from the carton and label, and in lieu thereof the following inserted:

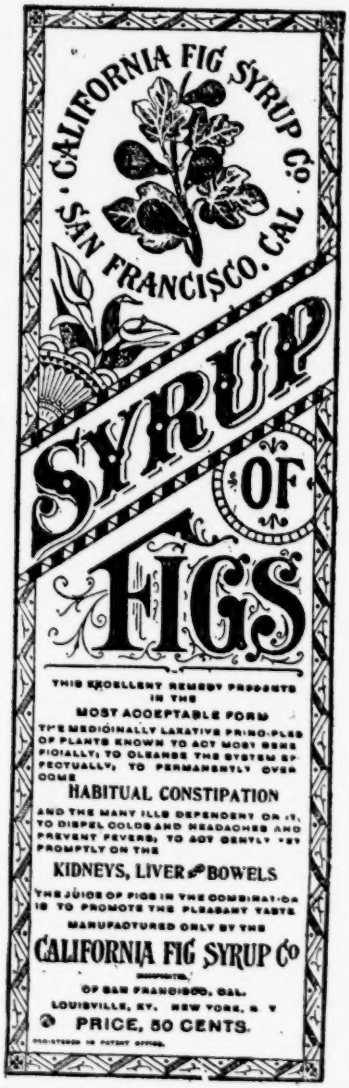
"This excellent remedy presents in the most acceptable form the medicinal laxative principles of plants known to act most beneficially, to cleanse the system effectually, to permanently overcome habitual constipation and the many ills depending on it, to dispel colds and headaches and prevent fevers, to act gently and promptly on the kidneys, liver, and bowels. The juice of figs in the composition is to promote the pleasant taste."

In other words, appellee erased from its interior label the statement that the medicine was a California liquid fruit remedy, and also the direct statement on the outside carton that it contained the laxative and nutritious juice of figs of California, and in place thereof substituted the ambiguous language last quoted above. The new label still contains the words "California Fig Syrup Company, San Francisco, California" surrounding a fig branch bearing the ripe fruit and also the words in bold type, "Syrup of Figs." It still contains the false statement that the medicine overcomes habitual constipation, and there is added to it another false statement that the juice of figs in the composition is to promote the pleasant taste.

It also contains on each end a cut of a young lady holding a fig branch in her hands.

On the next page is a fac-simile of the face of the new label.

NEW LABEL.


CALIFORNIA FIG SYRUP Co.
SAN FRANCISCO, CAL.
SYRUP
OF
FIGS
THIS EXCELLENT REMEDY PRODUCTS IN THE
MOST ACCEPTABLE FORM
THE MEDICINALLY LAXATIVE PRINCIPLES OF PLANTS KNOWN TO ACT MOST BENEFICIALLY, TO CLEANSE THE SYSTEM EFFECTUALLY, TO PERMANENTLY OVERCOME
HABITUAL CONSTIPATION
AND THE MANY ILLS DEPENDENT ON IT, TO DISPEL COLDS AND HEADACHES AND PREVENT FEVERS, TO ACT GENTLY YET PROMPTLY ON THE
KIDNEYS, LIVER & BOWELS
THE JUICE OF FIGS IN THE COMBINATION IS TO PROMOTE THE PLEASANT TASTE.
MANUFACTURED ONLY BY THE
CALIFORNIA FIG SYRUP Co
OF SAN FRANCISCO, CAL.
LOUISVILLE, KY. NEW YORK, N. Y.
PRICE, 50 CENTS.

We maintain that this new label is as fraudulent and deceptive as the old one. The words "Syrup of Figs," as applied to the medicine, in and of themselves indicate that the medicine is made from figs. The Circuit Court of Appeals for the Sixth Circuit said:

"It is manifest that the term 'Syrup of Figs' used to describe a medicinal preparation has a distinct and definite meaning, namely, a combination of sugar and the juice of the fig and possibly other ingredients, in which however, the medicinal property of the fig is the active and chief element." (73 Fed. R. 815.)

This is the plain common sense view to be taken of those words. If any evidence be needed for so simple a proposition, it will be found in the record. (See testimony of Harry N. Gray, p. 380; of Henry E. Hall, p. 391-94; of James Madison Quay, 398-99; of Joseph D. Grant, p. 422; and A. Cheesebrough, p. 425-26; of W. P. Redington, pp. 235, 238, 241; and of J. A. Bright, p. 530-31.)

It is conceded that the appellee's medicine is not a syrup of figs. In deciding the case at bar Judge Gilbert said:

"The appellee's medicinal preparation is not a syrup of figs. It is not made from figs, and the quantity of figs used in its preparation is so small that it must be conceded to have little, if any, perceptible effect either in promoting the pleasant taste or otherwise." (102 Fed. R. 337.)

It is shown by the testimony that the medicine contains but a fraction of one per cent of fig juice, and that

this infinitesimal quantity has no effect whatever on the compound either by way of promoting the pleasant taste or adding any medicinal virtue.

Judge Taft said in the Stearns case, 73 Fed. Rep. 816:

"Just a suspicion of fig juice has been put into the preparation, not for the purpose of changing its medicinal character or even its flavor, but simply to give a weak support to the statement that the article sold is syrup of figs. This is a fraud upon the public."

In view of these facts, we submit that the name "Syrup of Figs" is in and of itself a false assertion, a deceptive term, and a fraud upon the public. This evident intent to deceive is accentuated by the pictures on the labels consisting of fig branches bearing figs, and of young ladies holding fig branches in their hands. Plainly the idea was to convey the impression that the medicine was made from figs.

Again, the new label says that this medicine

"Presents in the most acceptable form the medicinal laxative principles of plants known to act most beneficially to cleanse the system," etc.

What plants are referred to? The only representation of anything in the shape of a plant on the label is the fig branch. There is no statement on this label that the active principle of the medicine is senna. The public is left to infer that the active principle is figs.

And still further, the new label proclaims that the medicine will permanently overcome habitual constipa-

tion. This is a direct and positive falsehood. There is no medicine known to science that will permanently overcome habitual constipation. See testimony of Dr. Kerr (Rec. p. 568) and Dr. Dodge (Id. 556).

These physicians were called for the purpose of showing the falsity of such a contention and they testify squarely to the fact. They were not contradicted, nor was there any attempt at contradiction. Therefore, as the evidence stands, it is an established fact of record that there is no medicine which will permanently overcome habitual constipation, and, consequently, this statement on the new label is a falsehood.

And finally, it is stated on the label that the juice of figs in the composition is to promote the pleasant taste. It will be observed that this language is printed in very small and almost illegible type. Unless a person has unusually good eye sight, he would need the aid of a magnifying glass to decipher it. It is scarcely possible that the purchaser would ever notice it, and even if he did, it is not likely that it would change the impression which had already been produced by the more striking statements and representations on the label tending to induce the belief that the medicine was made from figs.

But even this statement itself is a falsehood. It is not true that the juice of figs in the combination promotes the pleasant taste. There is such an infinitesimal amount of fig juice present that it can neither promote the pleasant taste nor have any other effect. *There is less than one-tenth of one per cent of fig juice in the medicine* (See finding of court in California Fig Syrup Co. v. Stearns, 73 Fed. Rep.

813), and this small quantity has no effect either medicinally or by way of promoting the taste. It cannot be detected. The medicine would be precisely the same both as to effect and as to taste if there were no fig juice in it at all. This is admitted by Mr. Queen, the man who manufactures the medicine. (See Record, pp. 98-9-100-1.)

As was said by Judge Taft, there is just *a suspicion of fig juice* in the preparation, which was put into it, "not for the purpose of changing its medicinal character or even its flavor, but simply to give a weak support to the statement that the article sold is syrup of figs." (73 Fed. R. 816.)

And Judge Gilbert says in the case at bar, "The appellee's medicinal preparation is not a syrup of figs. It is not made from figs, and the quantity of figs used in its preparation is so small that it must be conceded to have little, if any, perceptible effect either in promoting the pleasant taste or otherwise." (Record, 642.)

Thus we see, that according to Mr. Queen, the manufacturer of the medicine, and according to the findings of the Court of Appeals of the Sixth Circuit, through Judge Taft, and the findings of the Court of Appeals of the Ninth Circuit, through Judge Gilbert, there is but an infinitesimal amount of fig juice in this medicine, and the same has no effect whatever either medicinally or by way of promoting the pleasant taste. To put it in the exact language of Judge Gilbert, "the quantity of figs used in its preparation is so small that it must be conceded to have little, if any, perceptible effect either in promoting the pleasant taste or otherwise." It follows conclusively, therefore, in our judgment, that the statement on the

new label relied upon by appellee to repel the charge of fraud, viz., the statement that the juice of the fig is put in to promote the pleasant taste, is itself a false statement. In this new label, therefore, we have the following distinct misrepresentations:

First.—The designation of the medicine as a syrup of figs; whereas, according to Judge Gilbert, it is not a syrup of figs nor made from figs.

Second.—The statement that the medicine overcomes habitual constipation; whereas, according to the medical testimony, that is impossible.

Third.—The statement that the juice of figs in the medicine is to promote the pleasant taste; whereas, according to Mr. Queen, the manufacturer of the medicine, and according to Judge Gilbert in his decision, as well as according to the decisions of the eastern circuits, the small quantity of fig juice in the medicine does not promote the pleasant taste nor does it add anything whatever to the medicine.

The answer which the Court of Appeals in the case at bar made to this obvious proposition is, (1). That the term "Syrup of Figs" is not deceptive, because a person who takes such a medicine must necessarily know that its virtues are not due to fig juice, and (2), If he did not know that fact, then there is to be found on the label a distinct intimation to the contrary which would correct the false impression.

The exact language used by the learned judge who rendered the opinion is as follows:

"We do not think the name 'Syrup of Figs' as applied to the appellee's preparation is in itself calculated to mislead or deceive the public to any material extent. Any one who knows enough to take medicine when he is ill, must know that a liquid medicine to be taken in small doses as a laxative, would be worthless for the purpose intended if it consisted of nothing more than a syrup or decoction of figs. There is in the form in which the medicine is presented, the purpose for which it is used, and the size of the dose which is prescribed, sufficient to charge him with notice that the medicine contains something more than a preparation of figs. And if, indeed, he be so uninformed and ignorant that the name 'Syrup of Figs' alone conveys to him the impression that the compound is made of figs, there may be found in the carton a distinct intimation to the contrary. It is there declared that the remedy presents in the most acceptable form the medicinal laxative principles of plants known to act beneficially and that the juice of the figs in the combination is only to promote the pleasant taste."

Regarding the first part of this answer, it is sufficient for our purpose to state that it is square conflict with the decisions of the other circuits on that precise question. Said Judge Taft, in rendering the decision in the Stearns case, (73 Fed. Rep. 817):

"The argument for complainant is that because fig juice or syrup has no laxative property everybody ought to understand that when the term is used to designate a laxative medicine, it must have a fanciful meaning. But the fact is admitted that the public believes that fig juice

or syrup has laxative medicinal properties. It is to them that the complainant seeks to sell its preparation, and it is with respect to their knowledge and impressions that the character, whether descriptive or fanciful, of the term used, is to be determined."

And Judge Colt said in the Putnum case (66 Fed. Rep. 751):

"It may be true as a scientific fact known to physicians and pharmacists that the syrup of figs has little or no laxative property; but this is not the belief of the general public. They purchase this preparation on the faith that it is a laxative compound made from the fruit of the fig, which is false."

Undoubtedly these views are in conflict with those of the Court of Appeals of the Ninth Circuit in the case at bar.

As to the second answer advanced by the Court of Appeals in this case, viz: That there is a distinct intimation upon appellee's labels that the medicinal properties of its medicine is not due to figs, but that the juice of the fig is only to promote the pleasant taste, we desire to reiterate what we have already said before: *that this statement is in itself a false one, because the juice of the fig does not promote the pleasant taste*, for Judge Gilbert says in his opinion that the quantity used "is so small that it must be conceded to have little, if any, perceptible effect, either in promoting the pleasant taste or otherwise." And furthermore, on this point we desire again to say that, even if this statement were true, it could not in the nature of things correct the false impression conveyed by other

and more prominent representations on the labels due to the name of the article and the representations of fig branches bearing the ripe fruit. These representations, added to the popular impression that figs are laxative, necessarily convey to the mind of the public at large that the laxative principle of this medicine is due to figs.

In this connection it was urged by the appellee's counsel in the Court of Appeals, and will doubtless be urged by him here, that the appellee has published to the world the fact that the basis of its medicine is senna. These advertisements appear to have been inserted mostly in medical journals. It is scarcely possible that the public at large would ever see or read such journals, as they are read mostly by medical men. But irrespective of that, the fact still remains that the labels of the appellee, by which its medicine is sold, do not contain these representations. It is by the labels that the rights of appellee must be gauged, and not by the advertised statements in medical journals disconnected from the labels and the sale of the medicine itself. If a person is selling an article under a fraudulent name, trade-mark, and label, and is enabled to make his sales by reason of such fraud connected directly with the sale of the medicine itself, he cannot be relieved from the charge of fraud in a court of equity by pointing to the fact that he has advertised in certain medical journals of limited circulation statements counteracting the false impression conveyed by the name, trade-mark, and labels of his article. The fraud inheres in the name, trade-mark, and labels themselves as directly connected with the sale of the medicine.

We believe the record shows that the appellee also inserted advertisements in journals and papers other than medical, but, if we remember aright, in those advertisements there was no statement that the active principle of the medicine was senna, except in one or two instances.

Taking all these things together, we assert, without fear of successful contradiction, that this new label is fraudulent and deceptive under the decisions rendered by this and other courts. It would be useless for us, and possibly out of place at this time, to examine and analyze the cases on which we rely. They are so numerous that they would fill a book. But we venture to refer to two which are so aptly in point that they would seem amply sufficient for a correct disposition of the case. We refer to *Brown Chemical Company vs. Meyer*, 139 U. S. 540, and *Schmidt vs. Brieg*, 100 Cal. 673.

The first of these cases involved the use of the words "Brown's Iron Bitters," and it was held by this court that they could not be lawfully appropriated as a trademark because they were so far indicative of the ingredients, characteristics, and purposes of the medicine as to be incapable of lawful appropriation by way of trademark. In other words, they were *ex vi termini* descriptive. This decision was based on the leading cases of

Canal Co. vs. Clark, 13 Wall. 311;

Mfg. Co. vs. Trainer, 101 U. S. 51;

Caswell vs. Davis, 35 N. Y. 281;

Thompson vs. Winchester, 19 Pick. 214;

Raggett vs. Findlater (L. R. 17 Eq. 29).

The second case quoted, *Schmidt vs. Brieg*, 100 Cal. 673, involved the asserted right of appropriating the words "Sarsaparilla and Iron" as applied to a drink. Following the decision of this court in *Brown Chemical Co. vs. Meyer*, above quoted, the Supreme Court of California held that the words "Sarsaparilla and Iron" were in and of themselves so far descriptive that they could not be appropriated as a trade-mark. In answer to that contention the plaintiff in the case argued that his beverage was not made from sarsaparilla and iron, and that it contained such an infinitesimal quantity of sarsaparilla and iron that it did not give to the compound any distinctive characteristic, and, therefore, the name was purely fanciful. This is the precise argument put forth by the California Fig Syrup Company; but the California Supreme Court was not impressed with the argument in that regard and held it to be unsound. In rendering their decision they said:

"But it is claimed by respondents (plaintiffs below) that the words 'Sarsaparilla and Iron' do not, in fact, indicate the character, kind, or quality of their beverage; that it is not a composition of sarsaparilla and iron, but a solution of various substances; that it contains only a small quantity of iron, and the name was given to the beverage only as a name by which it might be known, without in any way being descriptive; but it is sufficient to say in answer to this claim that the name given to the article is either generic, or it is of such a character that it can as well be applied to defendants' beverage as to the plaintiffs."

This clearly expresses the established law on the subject and is based on the leading case of *Manhattan Medicine Co. vs. Wood* (108 U. S. 218). Others of similar import are *The Leather Cloth Case* (4 De Gex J. & S. 137 and 11 H. of L. Cas. 523), *Clotworthy vs. Schepp* (42 Fed. R. 62), *Alden vs. Gross* (25 Mo. App. 123), *Connell vs. Reed* (128 Mass. 477), *Siegert vs. Abbott* (61 Md. 276), *Seabury vs. Grosvenor* (14 Blatchf. 262), *Krauss vs. Peebles* (58 Fed. R. 585), *Mfg. Co. vs. Beeshore* (59 Fed. R. 572), *Fetridge vs. Wells* (13 How. Pr. 385), *Phalon vs. Wright* (5 Phila. 464), *Prince vs. Paint Co.* (135 N. Y. 24).

We do not have to go far to ascertain the reason why the California Fig Syrup Co. desires to convey the impression to the public that its medicine is composed of figs, or at least contains a substantial proportion of fig juice. The record on this subject is clear.

It is a known fact that there is a popular impression amongst people at large that figs have laxative properties. This impression has been known to exist from time immemorial, and is so firmly fixed that this court may possibly take judicial notice of it. But whether this court would take such notice of it or not, the testimony in the case proves it conclusively, for witness after witness testified to the existence of such popular impression. As a matter of fact this popular theory is a false one. Fig juice is not laxative—at least not more so than any fruit juice. The medical men tell us that the seed and the skin of the fig may possibly be slightly laxative, when eaten in large quantities, by reason of the mechanical or grinding action upon the coating of the intestines. Even that is disputed by some medical authorities. But

however that may be, it is conceded by all medical men that fig juice is not laxative. The appellee puts in his medicine no part of the seed or the skin of the fig, but merely an infinitesimal part of its non-laxative juice. The public, however, does not know this. They think that fig juice is laxative, and when they hear the term "Syrup of Figs" used, as applied to a laxative medicine, they naturally conclude that the medicine is made from fig juice, and that it has laxative properties. It was for the purpose of trading upon this popular, but false impression, that Mr. Queen adopted the name "Syrup of Figs." There is no question of this. There can be no other explanation.

In the statement of facts made by Judge Taft in the Stearns case (73 Fed. Rep. 813), we find the following:

"The popular impression that figs are laxative by reason of any medicinal element contained in them is erroneous. Their laxative effect, when eaten in some quantities, is caused by the physical action of the seeds and skin upon the bowels. There is practically no laxative property in the juice of the fig any different from the juice of any other fruit. It has no effect whatever unless taken in quantities as great as that of a pint or a quart."

And Judge Swan, in the same case in the lower court said (67 Fed. R. 1014):

"There can be no doubt, therefore, either that the complainant's preparation is not in fact compounded of the juice of the fig, but its principle is senna, or that its name was adopted and is used for the purpose of trading upon the popular fallacy that the juice of the fig in medic-

inal doses is an effectual remedy for constipation—an impression which is admitted to be without foundation —or that the ordinary purchaser buys the compound as and for the fruit remedy which it is advertised and asserted to be."

The basis of appellee's medicine is the well-known drug called *senna*, which has highly laxative properties. With this Mr. Queen compounds certain aromatic and saccharine substances, which he in his testimony bunches together under the nebulous term "aromatic carminatives." In this way he has produced a laxative medicine, whose basis is *senna*, and has called it by the deceptive term "Syrup of Figs" for the purpose of trading upon the popular but erroneous impression of the public that figs are laxative. All the indicia of the labels tend to show this. The name "Syrup of Figs," the name of the company, "California Fig Syrup Company," the picture of the young lady holding up a fig branch with ripe figs thereon, all support our theory. Mr. Queen could have had no other motive in view than that which we attribute to him. His medicine could more properly be termed a syrup of senna. By no process of honest reasoning can it be called a syrup of figs.

Judge Colt says: "The compound is not a syrup of figs. It might more properly be termed a syrup of senna, etc." (66 Fed. R. 750.)

Judge Taft says, "Just a suspicion of fig juice has been put into the preparation." (73 Fed. R. 816.)

Judge Gilbert says that this medicine "Is not a syrup of figs. It is not made from figs." (102 Fed. R. 337.)

As further showing the intention of appellee in this regard we refer to the testimony of George Alt (Record 326-346-8-9, 350-1, 356-7) who avers that he was one of the incorporators of the California Fig Syrup Co. and president thereof from June, 1882, to October, 1883; that he personally manufactured the medicine in Nevada, under the direction of Mr. Queen, for nearly two years, and was thoroughly familiar with the formula; that no figs whatever were used in the medicine, but Mr. Queen delivered to him an old gunny-sack full of figs and instructed him to expose them to view in the factory so that the public would get the impression that figs were actually used, and in accordance with these orders he did expose the figs to public view.

Now, in view of all these facts, it seems impossible for us to avoid the conclusion that this name is in and of itself a fraudulent representation. Two eastern courts of appeal have squarely so decided. The Court of Appeals of the Ninth Circuit holds otherwise. A conflict has thereby arisen. The appellee may lawfully sell its medicine under this fraudulent name throughout all the states of the Ninth Circuit, and can prevent all other persons from there selling a similar medicine under the same name. It is unlawful in the Ninth Circuit for Clinton E. Worden & Co. to sell their medicine under the name "Syrup of Figs." But outside of and beyond the confines of the ninth circuit it is lawful for him or any other person to manufacture and sell said medicine under the said name. That which is criminal in the ninth circuit is perfectly just and lawful in the other circuits. The law is one thing in the ninth circuit and a different

thing in the other circuits. We submit that, if this state of the law is allowed to stand, it will be a reproach to our judicial system, and this court cannot any too soon interfere and decide between the conflicting theories to the end that uniformity of decision may be established for all the circuit courts of appeals throughout the United States. This is precisely such a case as was contemplated by the framers of the Circuit Court of Appeals Act when they provided by section six that this court, as the supreme judicial tribunal of the land, should have the power to issue writs of *certiorari* to bring up for review cases that had been improperly or improvidently decided by the courts of appeals.

For the reasons hereinabove advanced we respectfully submit that the writ of *certiorari* should be granted in this case in accordance with the prayer of the petition.

JOHN H. MILLER,
Counsel for Petitioner.

PURCELL ROWE,
Of Counsel.

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Clerk.

No. 1901 36

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

CLINTON E. WORDEN & CO.,

Appellants,

vs.

CALIFORNIA FIG SYRUP COMPANY,

Appellee.

Can the words "Syrup of Figs" be appropriated as a trademark for a laxative medicine, containing but an infinitesimal quantity of fig juice, which gives no effect to the medicine either medicinally or otherwise, and which is used merely to trade on the popular fallacy that figs are laxative?

Brief on Behalf of Appellant.

JOHN H. MILLER,
PURCELL ROWE,
For Appellants.

PRIOR ADJUDICATIONS

On the Trade-Mark Syrup of Figs.

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1. Cal. Fig Syrup Co. *vs.* Imp. Fig Syrup Co. ..... 51 Fed., 296
2. Imp. Fig Syrup Co. *vs.* Cal. Fig Syrup Co. ..... 54 " 175
3. Cal. Fig Syrup Co. *vs.* Putnam..... 66 " 750
4. Cal. Fig Syrup Co. *vs.* Stearns..... 67 " 1008
5. Cal. Fig Syrup Co. *vs.* Putnam..... 69 " 741
6. Cal. Fig Syrup Co. *vs.* Stearns..... 73 " 813
7. Cal. Fig Syrup Co. *vs.* Worden..... 86 " 212
8. Cal. Fig Syrup Co. *vs.* Worden..... 95 " 132
9. Worden *vs.* Cal. Fig Syrup Co.....102 " 334

No. 192.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

CLINTON E. WORDEN & CO.,
APPELLANT AND PETITIONER,

vs.

CALIFORNIA FIG SYRUP COMPANY,
APPELLEE.

Brief for Petitioner.

This case has been brought here by writ of *certiorari*. It was instituted by the California Fig Syrup Company against Clinton E. Worden & Co. in the Circuit Court of the United States for the Northern District of California. Its object was to restrain the infringement of a common law trade-mark consisting of the words "Syrup of Figs" or "Fig Syrup," as applied to a liquid laxative medicine, and also to enjoin unfair competition in trade by reason of the use of alleged simulated labels and wrappers.

The bill charged that in 1879 one Richard E. Queen, of Reno, Nevada, "invented" the medicine in question and adopted as a trade-mark therefor the words "Syrup of Figs" or "Fig Syrup," by which name the medicine became known, and also that he put up the medicine in a certain style of bottle and wrapped it with a certain label which gave it a distinctive appearance.

This trade-mark, together with the label and good will of the business, Mr. Queen sold to the appellee, a corporation created under the laws of California, which corporation has ever since been selling the medicine.

The usual charge of infringement was made, asserting that the appellant had sold a similar medicine of inferior composition under the same name and put up in bottles and dressed in labels and wrappers so closely resembling those of the appellee as to deceive the public.

The prayer of the bill was for an injunction to restrain the appellant from infringing upon the trade-mark proper and also from unfair competition in trade by reason of simulated labels.

The appellee based its cause of action solely upon its common law rights, no registration of any kind being alleged or relied on, and the ground of jurisdiction was diverse citizenship of the parties.

A preliminary injunction was granted in the case by

the circuit court (Judge Morrow presiding), and is reported in 86 Federal Reporter at page 212, *et seq.* This injunction was granted solely on the ground of unfair competition in trade by reason of simulated labels and wrappers and not on the ground of infringement of the trade-mark proper. In rendering its decision thereon the court said:

"The bill of complaint in this case proceeds upon the theory that the rights of the complainant have been infringed by the defendant by unfair competition. It is not strictly a charge of infringement of a trade-mark, although it has many of the elements of such a case; but the facts alleged by the complainant are plainly set forth for the purpose of establishing the charge that the defendants are engaged in an unfair and fraudulent competition against the business of the complainant, conducted with the intent on the part of the defendants to avail themselves of the reputation of the defendants to palm off their goods as the goods prepared and put up by the complainant. The main question is, therefore, one of fact, since the law on the subject has been settled by numerous authorities."

California Fig Syrup Co. vs. *Clinton E. Worden & Co.*, 86 Fed. Rep., 215.

Thereafter on final hearing the circuit court entered its decree in favor of the appellee, whereby it enjoined the appellant broadly from using the words "Syrup of

Figs" and "Fig Syrup" as a trade-mark, and also from unfair competition in trade by reason of simulated labels and wrappers. This decree will be found at page 579 of the record, and the opinion of the court rendered thereon at page 574. The case on final hearing is reported in 95 Fed. Rep., 132. There is a conflict between the opinion of the court and the decree itself. By the opinion it will be seen that the court did not pass upon the question of trade-mark, but contented itself with holding that the defendant in the case was guilty of unfair competition in trade by reason of simulated labels and wrappers. The syllabus of the case says:

"The California Fig Syrup Company is entitled to protection from unfair competition in its business in the production and sale as a medicine of a compound known as "Syrup of Figs" *irrespective of any question of trade-mark*, and to an injunction against the production and sale of a similar article put up in such form that it can be sold to an ordinary purchaser as the preparation of said company."

The decree itself, however, goes beyond this opinion, and not only enjoins the use of simulated labels and wrappers, but likewise enjoins the use generally of the words "Syrup of Figs" and "Fig Syrup" as a trade-mark, without regard to the character or appearance of the label itself.

From this decree an appeal was prosecuted by the appellant to the circuit court of appeals for the ninth circuit, where the decree was affirmed by the votes of two of the judges, Honorables W. B. Gilbert and Thomas P. Hawley, against the dissent of the third judge constituting the court, Honorable Erskine M. Ross. The decree of the court of appeals will be found at page 645 and the opinion at pages 637 *et seq.* of the record.

Clinton W. Worden & Co. vs. California Fig Syrup Co., 102 Fed. Rep., 338.

Upon application made to this court at the October term, 1900, the writ of *certiorari* was granted on the ground of conflict of decision between different circuit courts of appeal, and the case is now before the court for hearing upon said writ.

The fundamental question to be determined by this court is, can the words "Syrup of Figs" or Fig Syrup' be lawfully appropriated as a trade-mark pure and simple under the facts disclosed by the record?

The question of simulated labels and wrappers is one of minor importance. If the appellant is guilty of any wrongdoing in that regard, it can and will willingly remedy it by changing the form of its labels and wrappers. But if the words "Syrup of Figs" or "Fig Syrup"

constitute a valid trade-mark, without regard to the form of the labels and wrappers, then the appellant will be precluded from the sale of the medicine under that name, whatever may be the form of its labels and wrappers, and thereby it will be perpetually enjoined from trading in the medicine at all. The appellee asserts in its bill that it has a common law right to those words as a trade-mark for its medicine under any and all circumstances, whether the medicine be sold in connection with labels and wrappers of peculiar style, form, and appearance, or whether the medicine be sold in demijohns, barrels, and tanks without any labels and wrappers whatever, providing it is sold under the name "Syrup of Figs" or "Fig Syrup."

Upon this broad contention as to trade-mark we take issue and submit that the words cannot be lawfully appropriated as a trade-mark under the law of California.

ARGUMENT.

I.

THE WORDS "SYRUP OF FIGS" OR "FIG SYRUP," AS APPLIED TO THE MEDICINE IN QUESTION, ARE EITHER DESCRIPTIVE OR DECEPTIVE, AND IN NEITHER EVENT CAN THEY BE APPROPRIATED AS A TRADE-MARK.

Section 991 of the Civil Code of California regulates the adoption of words and symbols as trade-marks, and provides that no words can be adopted as a valid trade-mark "which relate only to the name, quality, or description of the thing or business or place where the thing is produced or the business is carried on." This is merely the common law rule as to trade-marks, and finds support in *Choynski* vs. *Cohen*, 39 Cal., 501; *Burke* vs. *Cassin*, 45 Cal., 467, and *Schmidt* vs. *Brieg*, 100 Cal., 673.

The leading case in this court is *Canal Co.* vs. *Clark*, 13 Wall., 311, where the rule is stated as follows:

"Nor can a general name or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics be employed as a trade-mark and the exclusive use of it entitled to protection."

As illustrating the extent to which this rule has been carried, it will be interesting to note the subjoining list of words which have been held descriptive:

"Iron Bitters,"

Brown vs. *Meyer*, 139 U. S., 540.

"Sarsaparilla and Iron,"

Shcmidt vs. *Brieg*, 100 Cal., 673.

"Aromatic Schiedam Schnaps,"

Burke vs. *Cassin*, 45 Cal., 467.

"Desiccated Codfish,"

Town vs. *Stetson*, 5 Abb. Pr. (N. S.), 218.

"Antiquarian book store,"

Choynski vs. *Cohen*, 39 Cal., 501.

"Ferro-phosphorated elixir of calisaya bark,"

Caswell vs. Davis, 58 N. Y., 223.

"Cherry pectoral,"

Ayer vs. *Rushton*, Codd Dig., 229.

"Tasteless drugs,"

In re Dick & Co., 9 O. G., 538.

"Burgess' essence of anchovies,"

Burgess vs. *Burgess*, 3 De G. M. & G., 896.

"Balm of a thousand flowers,"

Fetridge vs. *Wells*, 4 Abb. Pr., 144.

"Club-house gin,"

Corwin vs. *Daly*, 7 Bos., 222.

"Extract of night-blooming cereus,"

Phalon vs. *Wright*, 5 Phila., 464.

"Liebig's extract of meat,"

Meat Co. vs. *Hanbury*, 17 L. T. N. S., 298.

"Bees-wax oil,"

In re Hathaway, Com. Dec. '71, p. 97.

"Invisible face powder,"

In re Palmer, Com. Dec. '71, p. 289.

"Razor steel,"

In re Roberts, Com. Dec. '71, p. 100.

"Mammoth wardrobe,"

Gray vs. *Koch*, 2 Mich. N. P., 119.

"Parson's purgative pills,"

In re Johnson Co., 2 O. G., 315.

"Crack-proof India rubber,"

In re Goodyear Rubber Co., 11 O. G., 1062.

"Croup Tincture,"

In re Roach, 10 O. G., 333.

"Cough remedy,"

Gilman vs. *Hunnewell*, 122 Mass., 139.

"Iron stone water pipes,"

In re Rader & Co., 13 O. G., 596.

"Nourishing stout,"

Raggett vs. *Findlater*, L. R. 17 Eq., 29.

"Angostura bitters,"

Siegert vs. Findlater, 7 Ch. Div., 801.

"Julienne soup,"

Godillot vs. *Hazard*, 49 How. Pr., 5.

"Paraffine oil,"

Young vs. *Macrae*, 9 Jur. N. S., 322.

"Lackawanna coal,"

Canal Co. vs. *Clark*, 13 Wall., 311.

"American sardines,"

In re Sardine Co., 2 O. G., 495.

"Straight cut,"

Ginter vs. *Kinney T. Co.*, 12 Fed R., 782.

"Homeopathic Specifics,"

Medicine Co. vs. *Wenz*, 14 Fed. R., 250.

"Cramp cure,"

L. H. Harris vs. *Stucky*, 46 Fed. R., 624.

An application of this doctrine to the facts in hand will show that the words "Syrup of Figs" and "Fig Syrup" cannot lawfully be appropriated as a trade-mark. In and of themselves as a matter of language they can mean only that the medicine to which they are applied is a syrup made from figs, or at least that the medicine contains figs in substantial quantities. That these words were originally adopted by Mr. Queen for the express purpose of being descriptive of the medicine is quite apparent from his testimony. He claims to have "invented" the medicine and to have originated the words. He was a retail druggist in the town of Reno, Nevada, and in 1878 began to experiment with a view to producing a

laxative medicine (Record 81). He was aware of the popular impression, which has existed from time immemorial, that figs possess laxative properties, and he apparently determined to take advantage of and trade upon that popular impression by manufacturing a medicine which contained large quantities of figs or fig juice. As a matter of fact, fig juice is not laxative, at least not more so than any other fruit juice. The laxative property of the fig, if it has any such property, is due to the mechanical action of the *seeds* and *skin* upon the intestinal canal. This appears to be the concensus of opinion among all medical men. The witness Lengfeld, an eminent chemist, says: "Dr. Bruton, who is claimed to be the leading English authority on pharmacology and therapeutics, classes figs with bran, oatmeal, and other undesirable substances, claiming that its laxative properties are entirely due to the small seeds, or so-called small seeds—that is not the strict name—present in the fig." (Record, 308.)

It would appear, however, that in 1878 Mr. Queen was not fully convinced of this fact, and was of the opinion that fig *juice*, when used in substantial quantities in his medicine, would add to its laxative properties; for he began by using large quantities of fig juice. The soluble substance of the figs was dissolved in hot water and put

into the medicine in the shape of fig juice, while the seeds and skin were not used at all. (Record, 90.)

A simple "syrup," in its ordinary signification, is nothing more than a combination of water and saccharine matter, with a flavoring material added, which gives the name to the syrup. Syrups of lemon, orange, vanilla, etc., are familiar illustrations. Mr. Queen, according to his own testimony, manufactured a syrup of figs by dissolving the soluble parts of the fruit and mixing it with hot water and saccharine matter. This syrup he put into his medicine. His idea was to use large quantities of this fig juice, or syrup. He soon found, however, that this was deleterious to the medicine, destroying its stability and causing it to ferment. Therefore, he was compelled to cease using large quantities of fig juice, and reduced it to the present small amount, about one-tenth of one per cent. (Record, 92-93.)

The label originally adopted for his medicine and used until 1896 supports our contention. A copy of it appears opposite page 634 of the record. Upon it is a picture of a fig branch containing figs, enclosed within the name, "California Fig Syrup Company, San Francisco, Cal.," and underneath the cut are the words: "Syrup of figs presents in the most elegant form the laxative and nutritious juice of the figs of California," etc., etc.

And on a separate label attached directly to the bottle were the words: "Syrup of Figs, the California liquid fruit remedy, gentle and effective."

The advertisement of the medicine put forth by Mr. Queen and the California Fig Syrup Company support our contention. The one on page 599 of the record may be taken as a fair sample, and it plainly shows the intent of the designor. Among other things it contains a picture of a young lady holding aloft in one hand a fig branch containing figs, and in the other figs, which she has apparently just plucked from the branch.

Other advertisements will be found on pages 627-629-631 of the record.

It is impossible to misunderstand the intent of Mr. Queen in devising the name, labels, wrappers and advertisements for this medicine. He plainly intended to proclaim to the world, and by force of the language used does in effect proclaim to the world, that the juice of figs enters largely into his medicine as a substantial part thereof, intending thereby to trade upon the popular impression that figs are laxative.

But whatever may have been his actual intention, the words themselves, *ex proprio vigore*, convey the impression that the medicine is a syrup made from figs. Probably no testimony was needed in support of so obvious a

contention; but in order to make assurance doubly sure, we called a number of witnesses who possessed no technical knowledge of pharmacy or any actual knowledge of the constituents of this medicine, but who all knew of the popular impression that figs are laxative, and asked them what impression was produced on their minds when hearing for the first time the name "Syrup of Figs," as applied to a laxative medicine. They invariably replied that they very naturally supposed it to be a syrup made from figs.

Permit us to recall their evidence in part:

HARRY N. GRAY, contractor and member of the prominent firm of Gray Brothers, testified as follows:

"Q. 15. * * * Are you aware of any popular impression amongst people regarding the supposed laxative qualities of figs?

A. I know that the general impression is that they are laxative.

Q. 17. Now, when you first heard this name 'Syrup of Figs,' what did you suppose the article was, from hearing that name?

A. I suposed it was a syrup made from the fruit of figs." (Record, p. 380.)

HENRY E. HALL, wholesale jeweler, testified as follows:

"Q. 10. Now, when you first heard of the article, or saw it advertised as 'Syrup of Figs,' what impression

was produced on your mind as to the constituents of that article, if any? * * * * In other words, what impression, if any, did the name create in your mind concerning the article?

A. That it was a syrup made of figs, a syrup, sugar, etc. (Record, 391.)

X. Q. 16. Did you suppose when you saw this medicine advertised, that it was anything more than simply the juice of figs, or that it was a medicine to be taken in medicinal doses?

A. I suposed that it was a medicine made from the juice of figs." (Record, 394.)

JOSEPH MADISON QUAY, fiduciary agent and club man, testified as follows:

"Q. 23. What impression was conveyed to your mind when you first heard the name 'Syrup of Figs?'

A. The impression was that it was a medicine and laxative, and I think it is so advertised.

Q. 24. What impression was conveyed to your mind as to any constituents of that medicine?

A. Well, I supposed it was made of figs, and was a laxative the same as any other kind of fruit.

Q. 25. Have you been aware of the popular impression among people regarding the supposed laxative quality of figs? A. Yes, sir.

Q. 26. How long have you been aware of such an impression as that?

A. Ever since I was a child.

Q. 27. And when you saw this name 'Syrup of Figs' advertised as a laxative, and when you knew of the popular impression that figs were laxative, what impression

was conveyed to your mind from seeing this advertised name, 'Syrup of Figs,' or 'Fig Syrup,' as to the constituent elements, or any of the constituent elements?

A. I would suppose it was made from figs."

(Record, 398-9.)

JOSEPH D. GRANT, of Murphy, Grant & Co., testified as follows:

"Q. 13. Now, when you saw the name 'Syrup of Figs' in connection with that preparation, what did you suppose were the constituents, or chief constituents?

A. I supposed it was made of figs in some way."

(Record, 422.)

A. CHEESEBROUGH, member of the firm of Williams, Dimond & Co., testified as follows:

"Q. 11. Now, when you saw that name 'Syrup of Figs' advertised in that way, what impression was conveyed on your mind as to the constituents, or any of the constituents, of the preparation?

A. Well, I could only take it as it read, that it was a preparation made from figs, syrup of figs. * * *

Q. 16. Have you ever used this 'Syrup of Figs?'

A. No, sir, I have not. I have thought of using it, but I have never used it. I am very fond of figs, and, consequently, have thought well of the syrup.

Q. 17. Now, what was it, Mr. Cheesebrough, that induced you to think of using it? * * *

A. Because I am passionately fond of figs. There is very seldom a day that I don't have them; don't eat them.

Q. And was it from that fondness for figs that you thought of using this medicine? A. Yes, sir."

(Record, 425-6.)

Nor was the above all. Witnesses for appellee testified to the same effect on cross-examination.

W. P. REDINGTON, wholesale druggist, who sells the medicine of appellee, was asked what impression would be produced on his mind when seeing the name for the first time applied to a laxative medicine. He answered as follows:

"If I had looked at it and saw 'Syrup of Figs' on the label, I would conclude that there was a syrup of figs in it. *I could not come to any other conclusion.* I would conclude that syrup of figs was in it, if I knew nothing about the preparation." (Record, 235.)

And on further cross-examination he gave the following testimony:

"X. Q. 92. Is it your idea that buyers of this 'Syrup of Figs' would be largely influenced in buying it by the fact that there is a popular impression that figs have laxative properties? I refer to those people who do not know the actual constituents of the medicine, but are merely buying it because it is a well advertised laxative?

A. Well, I think many would buy it from the fact that they might consider that syrup of figs was in it. A good many would buy it because it is an extensively advertised preparation, and they come across it and buy it."

(Record, 238.)

X. Q. 112. (Mr. ROWE) Mr. Redington, what did you mean by this expression in your affidavit: 'I regard the name 'Syrup of Figs' or 'Fig Syrup' as applied to that liquid, laxative, medical preparation, as a name for a liquid laxative, a popular suggestion, or a pleasant suggestion?' What did you mean by the phrase 'popular suggestion, or pleasant suggestion?'

A. Because it is the prevailing opinion that figs are laxative, *and it was evidently to convey the impression that there were figs in that preparation.*" (Record, 241.

The following extract is taken from the testimony of J. A. BRIGHT, a retail druggist, called by appellee as a witness:

"X. Q. 144. I ask you what the impression would be that would be carried to the mind by the words for the first time?

A. That it was syrup of figs. (Record, 530.)

X. Q. 149. I presume that you are aware of the popular impression that has prevailed for a long time to the effect that figs are laxative in some way, are you not?

A. Yes, sir.

X. Q. 150. The public have that idea, or a great many of the public have that idea, have they not?

A. Yes, sir.

X. Q. 151. Now, would that make a medicine saleable as a laxative or not, that it contained, or had a statement that it contained, figs in some form or other?

A. I think it would. (Record, 531.)

X. Q. 157. I want to know from your experience as a druggist of long standing in selling medicine of this and other kinds to the public at large, men, women and boys,

for instance, when they come into your store to ask for a laxative medicine, wanting a laxative medicine, when they see this bottle upon your shelf with 'Syrup of Figs' on it, and when they know, or have an idea that figs are laxative, now, from your experience, what would be the impression that would be conveyed to the minds of such people when seeing that name?

A. That it would be a good laxative medicine."

This matter was discussed by Judge Colt in the case of *California Fig Syrup Co.* vs. *Putnam*, 66 Fed. Rep. 751, where we find the following:

"Thus we see that the leading representation on the labels, packages, and in the advertisements of this preparation is, that it is a laxative fruit syrup made from the juice of the California figs. Mr. Winslow, a witness for the plaintiff, fairly expresses the public idea of this compound in reply to the following question:

'What did you suppose "Syrup of Figs" was composed of when you purchased your first bottle? A. I supposed it was made from the natural fruit. It called for the fruit.'

The popularity of this medicine arises from the belief in the mind of the ordinary purchaser that he is buying a laxative compound, the essential ingredient of which is the California fig; whereas, in fact, he is buying a medicine, the active property of which is senna."

This proposition is so obvious that we must apologize for having dwelt on it to such extent. The words themselves convey to the mind of the ordinary purchaser, who

has no knowledge of pharmacy or medicine, no other impression than that testified to by the witnesses, viz: that it represents a laxative medicine composed of figs in some form or other. It may be true that physicians, chemists, and pharmacists, who, by virtue of their technical knowledge, know that there is no such thing as a fig syrup, might not receive that impression from first hearing the name, but this is not true of the ordinary purchaser.

We are unable to distinguish this case from that of *Brown Chemical Co.* vs. *Meyer*, 139 U. S., 540, where the words involved were "Brown's Iron Bitters." This court said, through Mr. Justice Brown:

"And we think the words 'Iron Bitters' are so far indicative of the ingredients, characteristics, and purposes of the plaintiff's preparation as to fall within the scope of these decisions."

The California case of *Schmidt* vs. *Brieg*, 100 Cal., 673, involved the asserted right to appropriate the words "Sarsaparilla and Iron," as applied to a drink. There the court said:

"Words which are merely descriptive of the character, quality, or composition of an article cannot be monopolized as a trade-mark. Thus it has been held that the words 'Iron Bitters' are so far indicative of the qualities of an article as to fall within the scope of the rule. (*Brown Chemical Co.* vs. *Meyer*, 139 U. S., 542.) And

that name is no more generic than the name 'Sarsaparilla and Iron.' * * * We think the words 'Sarsaparilla and Iron' generic terms, and were used for the purpose of indicating not so much the origin, manufacture, or ownership of the beverage, as the quality of the article itself."

The answer which the appellee makes to this obvious proposition is in substance that the words "Syrup of Figs" and "Fig Syrup" are not descriptive of the medicine to which they are applied, but are purely fanciful and arbitrary, because there is no such thing known to pharmacy as a syrup made from figs, that fig juice is not laxative, and that there is such an infinitesimal quantity of fig juice contained in this medicine that it does not give to the compound any virtue whatever, and is of no more value than so much honey or other saccharine matter. Or, to put it in more compact form, the contention substantially is that there is no appreciable quantity of figs in the compound and that the compound is not in reality what its name implies, because there is no such thing known to pharmacy as a syrup made from figs, and, therefore, the name is not descriptive, but purely fanciful and arbitrary. If this contention be true, then the appellee has avoided one difficulty merely to run afoul of another, and we accordingly state our second proposition as follows:

II.

IF THE COMPOUND CONTAINS NO APPRECIABLE QUANTITY OF FIGS AND THERE IS NO SUCH THING KNOWN TO PHARMACY AS A SYRUP MADE FROM FIGS, THEN THE USE OF THE WORDS "SYRUP OF FIGS," OR "FIG SYRUP," AS A TRADE-MARK FOR THIS MEDICINE, IS FRAUDULENT AND WILL NOT BE PROTECTED IN EQUITY.

It is the object of the trade-mark law to make tradesmen act honestly, although that is a difficult thing to accomplish. With that end in view no one is allowed to infringe the valid trade-mark of another who is himself free from blame, and the ground for injunction in such case is that no one will be allowed to palm off his goods on the public as and for those of another. A trade-mark indicates a particular man's goods, and when another person uses that mark on his own goods, he is thereby asserting to the world that those goods, which, as a matter of fact are made by him, are made by the other. In this way he gets the benefit of the reputation of the other man. This is a fraud, and equity prohibits it. The keynote of the trade-mark law is that a tradesman will not be allowed to defraud his neighbor by passing off his goods as those of his neighbor, and this he would do if

he were not prohibited from using his neighbor's trade-mark.

But this same rigid rule against fraud as applied to the infringer is applied with equal force to the trade-mark owner. If *he* is guilty of any fraud in the use of his trade-mark, he will not be protected in practicing that fraud upon the public. If his trade-mark deceives the public and makes them think they are getting something which they are not getting, then he is himself guilty of the same kind of fraud which he thinks to enjoin the infringer from practicing, and will not lend a hand in perpetrating the same. The courts decline to interfere in such case, not from any consideration for the infringer, but because the trade-mark owner himself is guilty of a fraud, and it is a fundamental maxim of equity that "He who hath done iniquity shall not have equity."

In the leading case of *Leather Cloth Co.* vs. *American Leather Cloth Co.*, 4 DeGex, J. & S., 137, 142, 144 (affirmed 11 H. L. Cas., 523), which was a suit where the statements on the face of the trade-mark were untrue, Lord Chancellor Westbury, says:

"When the owner of a trade-mark applies for an injunction to restrain the defendants from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade-

mark, or in the business connected with it, be himself guilty of any false or misleading representation; for, if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity. * * * Where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed in it. In other words, the right to the exclusive use of it cannot be maintained."

That case was cited and approved by this court in *Medicine Co.* vs. *Wood*, 108 U. S., 218, where a trade-mark was claimed in the words "Atwood's Vegetable Physical Jaundice Bitters." The labels attached to the bottles stated that the medicine was manufactured by Moses Atwood, of Georgetown, Mass., whereas in fact it was manufactured by another person in New York. Mr. Justice Field, speaking for the court, says, on page 223:

"To put forth a statement, therefore, in the form of a circular or label attached to an article, that it is manufactured in a particular place, by a person whose manufacture there had acquired a great reputation, when, in fact, it is manufactured by a different person at a different place, is a fraud upon the public which no court of equity will countenance."

The latest enunciation of the doctrine by this court is found in the case of *Holzapfels Compositions Co., Limited*, vs. *Rahtjen's American Composition Co.*, decided on

writ of *certiorari* Oct. 21, 1901, and reported in the advance sheets of the Supreme Court Reporter on December 2, 1901, page 8. In that case it was held that the designation of an article as "patented," when as matter of fact it was not patented, was such a fraudulent statement as disentitled the owner of the trade-mark to any relief in equity, and this court said, through his Honor, Mr. Justice Peckham:

"A symbol or label claimed as a trade-mark, so constituted or worded as to make or contain a distinct assertion which is false, will not be recognized, nor can any right to its exclusive use be maintained."

And in support of the doctrine this court cited *Manhattan Medicine Co.* vs. *Wood*, 108 U. S., 218, and *Allan B. Wrisley Co.* vs. *Iowa Soap Co.*, 104 Fed. Rep., 548.

The Wrisley case, above cited as being good law, seems to us conclusive of the case at bar. There the plaintiff had adopted as a trade-mark for soap, which he was manufacturing in the United States, the words "Old Country Soap," and the court held that those words in and of themselves conveyed the impression to purchasers that the soap was made in the old country. Consequently, it was held to be a fraud, because the soap was not made in the old country. If that be good law, how is it possible to avoid the conclusion that the term "Syrup of Figs"

conveys the impression that the medicine is made from figs? Can any two cases be more nearly alike in principle?

While it is not necessary to cite any further cases on this point, we have ventured to collect a few of the most striking merely as a matter of convenient reference, should this court desire to consider them.

In *Clotworthy* vs. *Schepp*, 42 Fed., 62, 63, the right to a trade-mark was claimed in the word "Puddine" in connection with the words "Rose" and "Vanilla." In his opinion Judge Lacombe says:

"The complainant himself is engaged in deceiving the very public whom he claims to protect from the deception of others. He calls his preparation 'fruit' puddine. In nine different places on his package this word 'fruit' is repeated, as descriptive of the article, and a dish of fruit (pears, grapes, etc.,) is most prominently depicted on one face of each packet. His packages plainly suggest that fruit of some kind enters into his compound. A chemical analysis produced by defendant, the substantial accuracy of which is not disputed, discloses the fact that his 'Puddine' is composed exclusively of corn starch, a small amount of saccharine matter, and a flavoring extract, with a little carmine added to give it color. It contains no fruit in any form. Under these circumstances complainant's rights are not sufficiently clear to warrant the granting of a preliminary injunction."

In *Alden* vs. *Gross*, 25 Mo. App., 123, 128. 130, a trade-mark was claimed in the words "Fruit Vinegar." In that case the court says:

"The vinegar thus branded was not manufactured out of fruit, in the plain, ordinary, usual sense of that term, but out of low wines distilled from cereals, and fruit enters into its composition only to a very insignificant extent. * * * It would be a novel application of the rule governing the subject of trade-marks, if one who manufactures vinegar out of cereals could appropriate to the article thus manufactured the word 'Fruit,' and thereby exclude another from using the word as descriptive of an article which is, in point of fact, manufactured out of fruit. * * * But whether the word 'Fruit,' in this connection, is purely indicative of the character or quality of the article or not, the plaintiffs' exclusive claim to it must fail on the further ground that the use of the word, in that connection, is clearly deceptive."

In *Connell* vs. *Reed*, 128 Mass., 477, the plaintiff sought to establish the exclusive right to the words "East Indian" as applied to his remedy. In that case Chief Justice Gray says:

"The conclusive answer to this suit is * * * that the plaintiffs have adopted and used these words to denote, and to indicate to the public, that the medicines were used in the East Indies, and that the formula for them was obtained there, neither of which is the fact. Under these circumstances to maintain this bill would

be to lend the aid of the court to a scheme to defraud the public."

In *Siegert* vs. *Abbott*, 61 Md., 276, 284, the subject matter of the trade-mark was "Angostura Bitters," which purported to have been prepared by Dr. Siegert at Angostura, now Port of Spain, Trinidad. In fact, Dr. Siegert was dead, and had never lived at the Port of Spain. In dismissing the bill the court says:

"It is a general rule of law, in cases of this kind, that courts of equity will not interfere by injunction where there is any lack of truth in the plaintiff's case; that is, where there is any misrepresentation in his trade-mark or labels."

In *Seabury* vs. *Grosvenor*, 14 Blatchf., 262, 263, Fed. Cas. No. 12,576, the word "Capcine" was sought to be appropriated as a trade-mark. In that case Mr. Justice Blatchford says:

"A registered trade-mark is claimed in the word 'Capcine.' Courts of equity refuse to interfere in behalf of persons who claim property in a trade-mark, acquired by advertising their wares under such representations as these above cited, if they are false. It is shown that there is no such article as 'Capcine' known in chemistry or medicine or otherwise. The authorities are clear that, in a case of this description, a plaintiff loses his right to claim the assistance of a court of equity."

In *Krauss* vs. *Jos. R. Peebles' Sons Co.*, 58 Fed., 585, 594, it was shown that the liquor sold as "Pepper Whisky" was in fact a mixture of Pepper whisky and other whiskies. Judge Taft, in his opinion, says:

"To bottle such a mixture, and sell it under the trade label and caution notices above referred to, is a false representation, and a fraud upon the purchasing public. A court of equity cannot protect property in a trade-mark thus fraudulently used. It is not material whether the foreign whisky mixed with Pepper's is as good or better whisky than Pepper's, or whether the mixture is better than pure Pepper whisky. The public are entitled to a true statement as to the origin of the whisky, if any statement is made at all. The complainants and Pepper are not to be protected in a deception of the public, even if it works to the advantage of the public."

In *Manufacturing Co.* vs. *Beeshore*, 8 C. C. A., 215, 59 Fed., 572, 574, a trade-mark was claimed in the words "One-Night Cough Cure." In the opinion of the court Mr. Justice Shiras says:

"In the present case, the so-called trade-mark, 'One-Night Cough Cure,' asserts a manifest falsehood or physiological impossibility. A cough or cold, so far seated as to require medical treatment, cannot be cured in a single night, and a pretense to the contrary is obviously an imposition on the ignorant."

In *Fetridge* vs. *Wells*, 13 How. Pr., 385, 390, 393, the plaintiff sold a soap under the name of "Balm of Thou-

sand Flowers." In denying the plaintiff's right to the exclusive use of these words as a trade-mark, Judge Duer says:

"I am fully convinced that the name 'Balm of Thousand Flowers' was invented and is now used to convey to the minds of purchasers the assurance that the highly scented liquid to which the name is given is, in truth, an extract or distillation from flowers, and, therefore, not merely an innocent, but a pleasant and salutary preparation. Not only is this the meaning that the words used naturally suggest, but in my opinion it is that which they actually and plainly express, and were designed to convey. * * * Let it not be said that it is of little consequence whether this representation be true or false. No representation can be more material than that of the ingredients of a compound which is recommended and sold as a medicine. There is none that is so likely to induce confidence in the application and use of the compound, and none that, when false, will more probably be attended with injurious, and perhaps fatal, consequences."

In *Schmidt* vs. *Brieg*, 100 Cal., 672, 678, the Supreme Court of California, in a case where a trade-mark was claimed in the words "Sarsaparilla and Iron," says:

"We think the words 'Sarsaparilla and Iron' are generic terms, and were used for the purpose of indicating, not so much the origin, manufacture, or ownership of the beverage, as the quality of the article itself. * * * The words 'Sarsaparilla and Iron' describe ingredients well known to the public. * * * But it is claimed

by respondents (plaintiffs below) that the words 'Sarsaparilla and Iron' do not, in fact, indicate the character, kind, or quality of their beverage; that it is not a composition of sarsaparilla and iron, but a solution of various substances; that it contains only a small quantity of sarsaparilla and a small quantity of iron, and the name was given to the beverage only as a name by which it might be known, without in any way being descriptive; but it is sufficient to say in answer to this claim that the name given to the article is either generic, or it is of such a character that it can as well be applied to defendants' beverage as to the plaintiffs."

In *Phalon* vs. *Wright*, 5 Phila., 464, 467, the subject of the trade-mark was "Extract of Night-Blooming Cereus." In that case the court says:

"They (the plaintiffs) admit that the name is a deception, as far as it is used to indicate the real character of the compound; that the perfume is no extract from the flower, and that the trade-mark is in that respect a pure invention. 'The Night-Blooming Cereus,' however, exists, a flower well known by that name, which, when first introduced to public notice, excited much attention. An extract may be made from that flower; any perfumer has the right to make such an extract and to call it what it is, by the name of the flower."

In *Prince Manuf'g Co.* vs. *Prince Metallic Paint Co.*, 135 N. Y., 24, 38, 39, the New York Court of Appeals, in denying the right to a trade-mark in the words "Prince's

Metallic Paint," by reason of a false representation as to the place from which the ore was obtained, says:

"Any material misrepresentation in a label or trademark as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity. The courts do not, in such cases, take into consideration the attitude of the defendant. * * * And, although the false article is as good as the true one, 'the privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce.'"

Permit us to apply the law announced by these cases to the facts in hand. In the first place, it may be very seriously doubted whether the courts would protect this medicine in any event, even though appellee was guilty of no fraud, for the reason that it is a *quack* medicine. We understand this term to mean a medicine whose composition is kept secret and is to be used without the prescription of a physician. In the case of *Kohler Manufacturing Co.* vs. *Beeshore*, 59 Fed Rep., 547, Mr. Justice Shiras, in delivering the opinion of the court of appeals of the third circuit, says:

"It has been more than once held in this circuit that courts of equity will not intervene by injunction in disputes between the owners of quack medicines, meaning thereby remedies or specifics whose composition is kept

secret and which are sold to be used by the purchasers without the advice of regular or licensed physicians. *Fowle* vs. *Spear* (Nov. term, 1847), 7 Pa. Law J., 176; *Heath* vs. *Wright*, 3 Wall. Jr., 141. A similar view has prevailed in several state courts. *Wolfe* vs. *Burke*, 56 N. Y., 115; *Smith* vs. *Woodruff*, 48 Barb., 438; *Laird* vs. *Wilder*, 9 Bush., 132."

The appellee's medicine would appear to fall within the above definition. It is manufactured by a secret formula and its ingredients are not known to the public except that senna is its basis and a minute quantity of fig juice is used, which latter it is conceded adds no beneficial effects to the medicine.

Physicians on behalf of appellant testified directly that the medicine is a quack remedy and that they never prescribed it or allowed their patients to use it. (See testimony of Dr. Gardner, page 414, and Dr. Dodge, page 558.)

In view of the foregoing, we think it very doubtful whether the court would protect this medicine in any event, for the reason that it is probably a quack remedy. But however that may be, whether it be a quack medicine or not, our position is that the appellee has been guilty of such fraudulent practices as will disentitle it to any relief in a court of equity. The appellee does not come into court with clean hands. He "hath committed iniquity," and, therefore, "cannot have equity."

The facts showing that the appellee has for many years been practicing a fraud on the public in connection with its medicine are without dispute. It is prepared according to a secret formula. Its essential constituent is stated to be *senna*. A microscopical amount of fig juice is added, but it has no more effect than the same quantity of any other saccharine matter would have. It has no medicinal properties whatever, and is beyond all question put into the medicine merely for the purpose of furnishing a foundation for the fraudulent statement that figs enter into the composition of the medicine. All the other component parts are unknown to the public. Mr. Queen bunches them together under the nebulous term "aromatic carminatives," but declines to state what they are (Record, p. 105). The medicine itself is called "Syrup of Figs" and "Fig Syrup," notwithstanding the fact that there is no such thing known to pharmacy as a syrup made from figs, and that, if such a syrup should be made, it would not possess laxative properties. This fact, however, though known to pharmacists, is not known to the public at large who use the medicine and who from hearing the name used in connection with a laxative compound would naturally conclude that the medicine was a syrup made from figs, just as they would naturally conclude that syrup of

hoarhound is a syrup made from hoarhound, or syrup of strawberry is a syrup made from strawberry.

Furthermore, there is a popular impression which has existed from time immemorial that figs possess laxative properties. Therefore, when a person hears of a liquid laxative medicine called "Syrup of Figs," he very naturally concludes, not only that the medicine is made from figs, but that it possesses the laxative properties popularly attributed to figs.

When Mr. Queen originated this medicine he undoubtedly intended to trade upon that popular impression and to induce the public to suppose that the medicine was made from figs and contained the laxative properties of figs. The literature issued by him and his company in connection with the medicine supports this theory. On the label originally used and continued in use for many years until the Eastern courts adjudged it to be a fraud, we find this statement: "Syrup of Figs presents in the most elegant form the laxative and nutritious juice of the figs of California combined with the medicinal virtues of plants known to be beneficial to the human system, forming an agreeable and effective laxative to permanently cure habitual constipation and the many ills attendant on a weak or inactive condition of the kidneys, liver, stomach and bowels."

And on the interior label affixed directly to the bottle were the words: "Syrup of figs, the California liquid fruit remedy, gentle and effective."

Here we find a batch of false statements. The medicine is not a syrup of figs; for according to Mr. Queen's own statement there is no such thing known to pharmacy as a syrup of figs. Nor is this medicine made from figs, because the amount of fig juice in it is so infinitesimal that it gives no effect to the compound whatever.

The next statement is equally false, viz: that the medicine "presents in the most elegant form the laxative and nutritious juice of the figs of California." The amount of fig juice in the medicine is so infinitesimal that it can scarcely be said to possess any fig juice at all, certainly not enough to add to it any value. But worse than all, Mr. Queen testified that fig juice does not possess laxative powers, and in this he is sustained by all the medical authorities. The statement is so palpably false and fraudulent that it would be useless to dwell on the subject.

Furthermore, the statement that the medicine will permanently cure habitual constipation is likewise false. There is no drug or compound of drugs which will permanently cure that ailment. Certainly senna, the basis of this medicine, will not do it. On this point all medi-

cal men agree. The two physicians called upon in that regard testified to the same. See testimony of Dr. Kerr (Record, page 568) and Dr. Dodge (Record, 556).

The statement that the medicine is a *California liquid fruit remedy* is equally false. It is not a fruit remedy at all. The quantity of fruit in it is infinitesimal. Nor was it a California fruit remedy at the start, because it was invented, manufactured and sold in the State of Nevada. Beyond all doubt the public has been grossly deceived by that statement, purchasing a concoction of drugs under the belief that they were purchasing a liquid fruit remedy.

And so likewise with regard to the advertising literature issued by appellee and published in medical journals and newspapers throughout the country. It seems therefrom that it was the studied effort of appellee to induce the public at large to believe that the essential ingredients of the medicine was the California fig, whereas as matter of fact it has practically no figs in it, and its essential ingredient is senna.

And finally, there is a bit of testimony in the record which places the matter beyond all doubt. When Mr. Queen "invented" his medicine Mr. George Alt, of Glendale, in the State of Nevada, furnished the money for floating the enterprise, and for a period of eighteen

months or two years Mr. Alt manufactured the medicine for Mr. Queen on his farm at Glendale. The medicine had originally been manufactured by Mr. Queen at Reno; but it was deemed advisable to change the place of manufacture to Glendale, where Mr. Alt personally manufactured the medicine. Mr. Queen furnished him with the formula and instructed him in the details of manufacture. In pursuance thereof Alt manufactured the medicine under and according to the formula so furnished him by Mr. Queen. This formula called for no figs nor fig juice nor any part of the fig. As actually made the medicine contained no figs nor fig juice nor any part of the fig, according to Mr. Alt's testimony.

The formula is as follows:

COMPLAINANT'S FORMULA.

(According to Alt's Testimony.)

" 50 lbs. Alexandria Senna.
22 gall. Hot Water.
100 lbs. Sugar.
2 oz. Cinnamon Oil.
2 oz. Clove Oil.
2 oz. Anise Oil.
2 gall. Alcohol.

Hot water poured over the senna and stands two hours before it is pressed; the alcohol and oils are then

added. It stands twenty-four hours and then it is strained; the sugar is then added.

Ground ginger is thrown between the layers of the senna and pressed with the leaves together; it prevents griping.

2 lbs. to gall."

It will thus be seen that the medicine which Mr. Queen claims to have "invented" is nothing more than a decoction of senna mixed with sugar and water and some flavoring extracts, with a little ginger added to prevent griping. The basis of the compound is senna, a drug which has been known for years to all medical men as a purgative. No figs appear in the formula, not even that "suspicion of fig juice" referred to by Judge Taft as having been put into the medicine to give some color to the statement that it contained figs. But in order to perpetuate the deception on the public which he had theretofore inaugurated and so successfully carried out, Mr. Queen delivered to Alt, along with the formula, an old gunny-sack filled with figs and instructed him to expose them to the public view at the factory, so that the public at large from seeing the same would naturally conclude that figs were used in the medicine. Mr. Alt testified to these facts and produced the formula. Mr. Queen admits that he delivered over to Mr. Alt the gunny-sack filled with figs, but denies that he instructed him to de-

ceive the public with them (Record, 502). The testimony given by Mr. Alt on the subject is as follows:

"Q. 24. Now, will you please give the formula under which that 'Fig Syrup' was then made? If you have any data in your possession, just produce it and state how you came by it and what it is.

A. (Producing.) I came by this when I went to manufacture it. Mr. Queen turned it over to me. The company insisted upon him giving us the formula so that it would not be kept secret from them when I went to manufacture it (Record, 326).

Q. 25. Mr. Alt, when you started in to manufacture this stuff up there for the California Fig Syrup Company, how did you get the formula by which to manufacture it?

A. Mr. Queen gave it to me.

Q. 26. Was it written out on paper?

A. Yes, sir.

Q. 27. Where was it put. * * * ?

A. The first formula was given to me to manufacture it by, and afterward the company objected to making a record in our minute-book of the formula. Mr. Queen would not agree to that, but he said he would give us the formula and he would lock it up.

Q. 27. Was it written out on paper?

A. Yes, sir.

Q. 28. Was it locked up? A. Yes, sir.

Q. 29. Where?

A. In a tin box left with the secretary. The secretary turned it over, I presume. I don't know anything about that.

Q. 30. Who was the secretary?

A. Sol. Levi. * * *

Q. 33. If I understand, this paper which you have produced, is not the original, but it is a copy?

A. No, it was copied from it.

Q. 34. When and where was this copy made?

A. Made in Reno.

Q. 35. By whom? A. By Sol. Levi.

Q. 36. When? A. In the spring of 1882.

Q. 37. Is it in his handwriting? A. Yes, sir.

Q. 38. Were you present there?

A. Yes, sir; I read it off to him to copy.

Q. 39. You read off the original to him?

A. Yes, sir.

Q. 40. And he made a copy?

A. Yes, sir.

Q. 41. Then what was done with this copy?

A. He put it in his safe. It has been there ever since.

Q. 42. When did you get this copy from him?

A. About a week ago.

Q. 43. Is this a true copy of the original formula?

A. All except the ginger below there. That was added after I went to manufacturing it.

Q. 44. I mean, is this a correct copy of the formula as you manufactured the medicine?

A. That is the correct formula as I manufactured it. * * *

Q. 45. Mr. Alt, I don't observe in this formula any figs. *Were there not any figs in the medicine?*

A. *No, sir.*

Q. 46. *Do you mean to say there were no figs at all or anything in the shape of figs?*

A. *No, sir; none whatever.*

Q. 47. Did you have any figs around the establishment?

A. I believe there was a sack bought and set in the wrapping house. * * *

Q. 50. Who had that done?

A. Mr. Queen.

Q. 51. Did he give any reason for it?

A. Well, he wanted to keep up an appearance that we were using figs, he said.

Q. 52. *But, as a matter of fact, there were no figs used at all?*

A. *None whatever; no, sir.*

Q. 53. During the whole time you were manufacturing it?

A. Not any. * * *

Q. 62. Now, did you have any conversation with Mr. Queen wherein he stated the reason for having adopted this name, 'Syrup of Figs,' or anything in that connection?

A. Well, he thought it was a good name to sell by; that a great many people thought that figs was a laxative, and he adopted the name for that purpose. * * *

Q. 63. Did Mr. Queen make any statement to you substantially of that kind?

A. Yes, sir. (Record, 346, 347, 348, 349, 350, 351.)

X. Q. 43. Did you at any time at that place, at Glendale, keep figs in sight so that if anybody came there—

A. (Interrupting).—Yes, sir.

X. Q. 44. You did that? A. Yes, sir.

X. Q. 45. You did that by direction of Mr. Queen?

A. Yes, sir; he ordered the figs.

X. Q. 46. That was at Glendale?

A. Yes, sir.

X. Q. 47. Then you did have the figs at Glendale?

A. Yes, sir.

X. Q. 48. How many did you have there?

A. He got a sack full of them.

X. Q. 49. Where were they?

A. They were left in the wrapping house."

(Record, 356.)

* * * * * * * *

X. Q. 62. Now, don't you know that Mr. Queen instructed you always in the manufacture of this medicine to use figs?

A. No, sir; never.

X. Q. 63. He did not? A. He never did.

X. Q. 64. You are positive about that?

A. I am.

X. Q. 65. Your idea was that that sack of figs was there simply for the purpose of deception?

A. *That is what he said himself; to keep it there and people would think we were using them.*"

(Record, 357.)

It further appears that Mr. Alt made an affidavit in the case of *California Fig Syrup Company* vs. *Improved Fig Syrup Company*, and he was questioned about the same on cross-examination by appellee's counsel herein; but after so questioning him concerning that affidavit, the appellee's counsel declined to put it in evidence (Record, 363), and thereupon we offered the affidavit in evidence ourselves in connection with the cross-examination thereon to which Mr. Alt had been subjected. The material portion of that affidavit is as follows:

"That he was one of the original incorporators of the complainant corporation, and acted as president of said corporation from June, 1882, until October 30, 1883.

"Affiant avers that he was engaged in the manufacture of complainant's laxative compound, commonly known as 'Syrup of Figs' or 'Fig Syrup' under the direction of R. E. Queen, one of the officers of said company, and now the president and general manager thereof, from January 1, 1882, until October 30, 1883; and that he, said affiant, thereby became acquainted with the ingredients which constitute complainant's said compound. Affiant further avers that said compound, during the said time, and while said affiant was so engaged in its manufacture, contained no fig extract or syrup of figs, and that no figs whatsoever were used in manufacturing said compound.

"That the factory of the complainant corporation, during the time hereinbefore mentioned, was situated in Glendale, State of Nevada.

"Affiant further avers that said R. E. Queen, president and general manager of said complainant corporation, said to this affiant that it would be well to keep figs in sight, in order that people coming into the factory would think that figs were used in the manufacture of the compound. Affiant further avers that said figs were placed on exhibition solely for deception, and were never used in the manufacture of said 'Syrup of Figs' during the time that said affiant was engaged in the manufacture thereof.

"Affiant further states that he has no knowledge of any change having been made in the formula used while he was manufacturing the fig syrup; and avers that said R.

E. Queen wrote to this affiant and asked him for the formula of 'Syrup of Figs' used by affiant while he was so as aforesaid manufacturing said compound, and after this affiant had ceased to have any interest in the said corporation."

It is quite apparent from the foregoing that this medicine had its inception in fraud. No reason has been advanced for doubting the veracity of Mr. Alt, and we submit that his testimony bears the impress of truth. Furthermore, it would have been a senseless proceeding to have gone to the expense of extracting the soluble portion of figs, preparing it into a syrup, and placing it in the medicine, for, as Mr. Queen justly remarks, this fig juice has no more effect than so much honey or other saccharine matter. The truth of the whole matter is, that Mr. Queen determined to take advantage of the popular impression that figs are laxative, and to give the public the impression that this medicine contained figs, knowing, as a chemist, that fig juice is not laxative, and, even if it were, that the infinitesimal quantity which he claims to use in the medicine would have no effect.

This conclusion is rendered irresistible when we remember that from the beginning of the manufacture of the medicine in 1878 up to the year 1896, a period of eighteen years, Mr. Queen and his company advertised and stated on his labels, that the preparation was a

California Liquid Fruit Remedy, and that it "*Presents in the most elegant form the laxative and nutritious juice of the figs of California.*"

As further showing probable fraud on the part of appellee, we cite the fact that its medicine is prepared by a secret formula, and the witness for appellee, who superintends the manufacture of the compound, refused on the witness stand to give the formula or to state what were the constituents of the medicine. We think we were entitled to know these facts. Where a person comes into a court of equity asking its protection for the name of a medicine prepared and sold by him, it is a most material fact that the court should know what are the constituents of the medicine in order to determine whether or not it is a proper case in which to give protection. Mr. Richard E. Queen offered himself as a witness on behalf of appellee and testified in the most general terms that the basis of the medicine was senna, and that it contained a small quantity of fig juice, less than one per cent., but declined to state what were the other constituents. (Record, 104-5.)

Mr. LOUIS T. QUEEN, a brother of Richard E. Queen, was also called as a witness on behalf of complainant. He testified that he was superintendent of the manufacturing department of the appellee engaged in

the actual preparation of the medicine, knew what were its constituents, and how it was made, but declined to say what were its constituents.

(Record, 255-6-7-8-9, *et seq.*)

We submit that we were entitled to cross-examine the witness as to the ingredients of the medicine, and the refusal of the witness to answer such questions was so far unreasonable as to disentitle complainant to any relief in equity. The complainant had, by general testimony, endeavored to show that the medicine in question was a good laxative and contained nothing harmful to the human system. Therefore, on cross-examination, we were clearly entitled to know the constituents of the medicine, so that the court could determine whether or not it contained anything harmful. It is a well known fact that a great many quack medicines contain ingredients harmful to the human system, and we were entitled to know whether that was true of the one before the court. The attitude of appellee is most unreasonable. It comes into court with what we charge to be a quack medicine, prepared according to a secret formula and containing secret ingredients, and while proclaiming to the world and assuring the court that the medicine is an excellent one and contains nothing harmful, refuses to state what the actual constituents are. Will

a court of equity lend a helping hand to such an unreasonable litigant?

The attitude of appellee becomes still more grotesque when we recall the fact that it charges the appellants with manufacturing a spurious medicine containing ingredients harmful to the human system. The appellants put in evidence the formula under which their medicine is made, showing that one of the ingredients was a small quantity of hyoscyamus, commonly called henbane. Of course, it is a well known fact that henbane is a poison, but it is equally well known that when mixed with other ingredients in such small proportions as that shown in our formula, it is not poisonous nor harmful, but is beneficial. Nevertheless, the appellee made a great capital of the fact that one of the ingredients of our medicine was a poison.

Another ingredient found in our formula is alcohol, which is used as a solvent for the drugs, and appellants endeavored to make capital of this fact by the pretense that the percentage of alcohol was so great as to make the medicine dangerous.

Thus we see that while the appellee was endeavoring by all the means in its power to show that the "Syrup of Figs" manufactured by us was a spurious article and harmful to the human system, at the same time both its

manager and its chemist were declining positively to state what were the ingredients of its own "Syrup of Figs." A more unreasonable position cannot well be imagined.

We think the facts disclosed by this record present a case of the most glaring fraud ever perpetrated upon a gullible public. It is no answer to say that the medicine is a good laxative, whether it has in it figs or not. The fact still remains that the purchasers *think* and *believe* that it has figs in it, and purchase it for that reason, being under the impression that figs are laxative.

In *Krauss* vs. *Jos. R. Peebles Sons Co.*, 58 Fed. Rep., 585, a similar question arose. Plaintiff was advertising a whisky as "Pepper" whisky, which was in fact a mixture of Pepper and other whiskies. It was insisted by plaintiff that his whisky was as good as, or better than, Pepper whisky, and for that reason the representation on his label was harmless. But the court said:

"It is not material whether the foreign whisky mixed with Pepper's is as good or better whisky than Pepper's, or whether the mixture is better than pure Pepper whisky. The public are entitled to a true statement as to the origin of the whisky, if any statement is made at all. The complainants and Pepper are not to be protected in a deception of the public, even if it works to the advantage of the public."

And so likewise in *Fetridge* vs. *Wells*, 13 How. Pr., 385, where the plaintiff had adopted as a trade-mark for soap the name "Balm of Thousand Flowers." The soap was not made from flowers, but it was shown to be an excellent article, and its owner insisted that the statement was, therefore, innocent. But Judge Duer said:

"Let it not be said that it is of little consequence whether this representation be true or false. No representation can be more material than that of the ingredients of the compound which is recommended and sold as a medicine. There is none that is so likely to induce confidence in the application and use of the compound, and none that, when false, will more probably be attended with injurious and perhaps fatal consequences."

A similar ruling was made in *Prince Manf'g Co.* vs. *Prince Metallic Paint Co.*, 135 N. Y., 24.

The case in hand falls clearly within the reasoning of the cases cited. The purchasers of "Fig Syrup" believe that it contains figs, and they purchase the medicine because of that belief. Hence, the statement is a fraudulent one, and the appellee cannot be protected in perpetuating such fraud.

The facts of the case at bar bring it squarely within the rule of the Supreme Court of California in the case of *Schmidt* vs. *Brieg*, heretofore quoted. The plaintiff

there sued to protect as a trade-mark the words "Sarsaparilla and Iron," as applied to a beverage. The defendant contended that the words were descriptive, and for that reason could not be appropriated as a trade-mark. The plaintiff replied by showing that there was such a small quantity of sarsaparilla and iron in his beverage that it did not give to the compound any distinctive characteristic, and for that reason it was not descriptive, but purely fanciful and arbitrary.

That is identically the situation now before the court in the case at bar.

But the Supreme Court of California was not impressed with plaintiff's argument in that regard, and held that it was unsound. We quote the following extract from the opinion at page 678:

"But it is claimed by respondents that the words 'Sarsaparilla and Iron' do not in fact indicate the character, kind, or quality of their beverage; that it is not a composition of sarsaparilla and iron, but a solution of various substances; that it contains only a small quantity of sarsaparilla and a small quantity of iron, and the name was given to the beverage only as a name by which it might be known, without in any way being descriptive; but it is sufficient to say in answer to this claim, that the name given to the article is either generic or it is of such a character that it can as well be applied to defendant's beverage as to plaintiff's; and this being so, as was said in *Canal Company* vs. *Clark*, 13 Wall., 327, al-

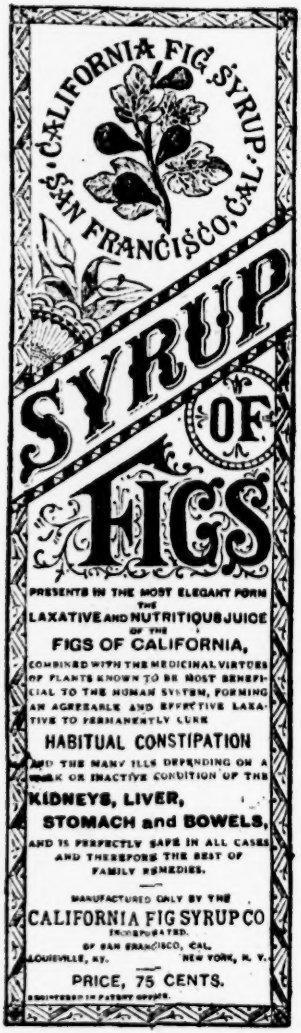
though the use of the name may be for the effect of causing the public to mistake as to the origin or ownership of the product, if it is just as true in its application to his goods as it is to those of another who first supplied it, there is no legal wrong done, the words or combinations being of such a character as to designate respectively well known articles of commerce."

It would seem impossible to find two cases more nearly parallel, and it was probably that fact which deterred the appellee here from bringing this case in the state court, and induced him to select the federal court as a forum. Had the case been brought in the state court, what doubt could there be as to the result? The lower court would have been bound by the decision of the supreme court in the "Sarsaparilla and Iron" case, and the latter tribunal would doubtless have affirmed the ruling.

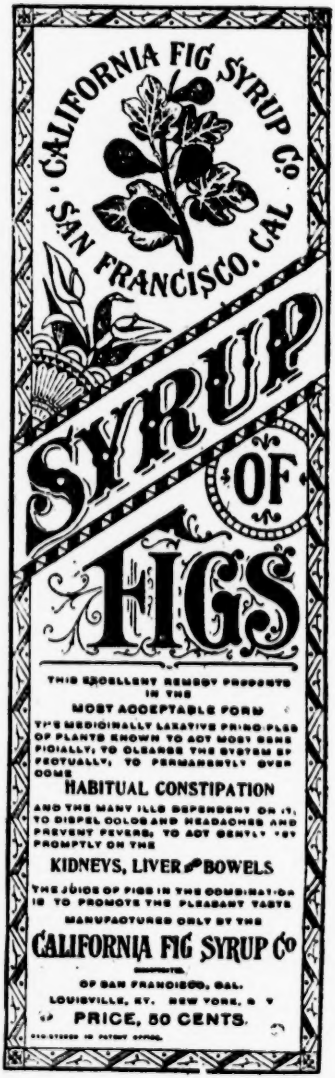
The reasoning of Judge Colt in the case of *California Fig Syrup Co.* vs. *Putnam* (66 Fed. Rep., 673), regarding this identical name, seems to us unanswerable. Said he:

"The popularity of this medicine arises from the belief in the mind of the ordinary purchaser that he is buying a laxative compound, the essential ingredient of which is the California fig, whereas, in fact, he is buying a medicine the active property of which is senna. The ethical principle on which the law of trade-marks is based will

OLD LABEL.


CALIFORNIA FIG SYRUP
SAN FRANCISCO, CAL.
SYRUP
OF
FIGS
PRESENTS IN THE MOST ELEGANT FORM THE
LAXATIVE AND NUTRITIOUS JUICE OF THE
FIGS OF CALIFORNIA,
COMBINED WITH THE MEDICINAL VIRTUES OF PLANTS KNOWN TO BE MOST BENEFICIAL TO THE HUMAN SYSTEM, FORMING AN AGREEABLE AND EFFECTIVE LAXATIVE TO PERMANENTLY CURE
HABITUAL CONSTIPATION
AND THE MANY ILLS DEPENDING ON A SLUGGISH OR INACTIVE CONDITION OF THE
KIDNEYS, LIVER,
STOMACH and BOWELS,
AND IS PERFECTLY SAFE IN ALL CASES AND THEREFORE THE BEST OF FAMILY REMEDIES.
MANUFACTURED ONLY BY THE
CALIFORNIA FIG SYRUP CO
INCORPORATED.
OF SAN FRANCISCO, CAL.
LOUISVILLE, KY. NEW YORK, N. Y.
PRICE, 75 CENTS.
REGISTERED IN PATENT OFFICE.

NEW LABEL.


CALIFORNIA FIG SYRUP Co
SAN FRANCISCO, CAL
SYRUP
OF
FIGS
THIS EXCELLENT REMEDY PRODUCTS IN THE
MOST ACCEPTABLE FORM
THE MEDICINALLY LAXATIVE PRINCIPLES OF PLANTS KNOWN TO ACT MOST BENEFICIALLY, TO CLEANSE THE SYSTEM EFFECTUALLY, TO PERMANENTLY OVERCOME
HABITUAL CONSTIPATION
AND THE MANY ILLS DEPENDENT ON IT, TO DISPEL COLDS AND HEADACHES AND PREVENT FEVERS; TO ACT GENTLY YET PROMPTLY ON THE
KIDNEYS, LIVER & BOWELS
THE JUICE OF FIGS IN THE COMBINATION IS TO PROMOTE THE PLEASANT TASTE
MANUFACTURED ONLY BY THE
CALIFORNIA FIG SYRUP Co
INCORPORATED.
OF SAN FRANCISCO, CAL.
LOUISVILLE, KY. NEW YORK, N. Y.
PRICE, 50 CENTS.
REGISTERED IN PATENT OFFICE.

not permit of any such deception. It may be true, as a scientific fact known to physicians and pharmacists, that the syrup of figs has little or no laxative property; but this is not the belief of the general public. They purchase this preparation on the faith that it is a laxative compound made from the fruit of the fig, which is false. This is not an immaterial representation the effect of which is harmless, but it is a representation which goes to the very essence of the plaintiff's right to a trademark in these words. The cases are numerous where the courts have refused to grant relief under these circumstances."

The answer which the appellee made to this position in the lower court was the assertion that, after the decision of the eastern courts holding the statements above referred to, false and fraudulent, the labels had been changed by removing therefrom the said false statement and by advertising to the world that the basis of the medicine was senna. On the adjoining page will be found in parallel columns the new and old labels. The new label still has the same appearance as the old one. It has the fig branch surrounded by the words "California Fig Syrup Company, San Francisco, Cal." It still has the name "Syrup of Figs." But instead of the assertion that it "Presents in the most elegant form the laxative and nutritious juice of the figs of California," it has the following statment:

"This remedy presents in the most acceptable form, *the medicinal laxative principles of plants known to act most beneficially to cleanse the system effectually, to permanently overcome habitual constipation and the many ills dependent on it*, to dispel colds and headaches and prevent fevers, to act gently and promptly on the kidneys, liver, and bowels. The juice of figs in the composition is to promote the pleasant taste."

In other words, appellee erased from its *interior label* (not the label in controversy) the statement that the medicine was a California liquid fruit remedy, and also the direct statement on the outside carton (the label in controversy) that it contained the laxative and nutritious juice of figs of California, and in place thereof substituted the ambiguous language last quoted. The new label still contains the words "California Fig Syrup Company, San Francisco, California," surrounding a fig branch bearing the ripe fruit, and also the words in bold type, "Syrup of Figs." It still contains the false statement that the medicine overcomes habitual constipation, and there is added to it another false statement which was not on the original label, viz., that the juice of figs in the composition is *to promote the pleasant taste*. The small amount of fig juice used cannot, and does not, promote the pleasant taste, and the court of appeals so held in the case at bar.

It also contains on each end a cut of a young lady

holding a fig branch in her hands, something which was not on the original label and which serves to accentuate the fraud. One of those cuts is in black and white while the other is in colors. See complainant's Exhibit A. on the folder opposite page 634 of Record.

We maintain that this new label is as fraudulent and deceptive as the old one. The words "Syrup of Figs," as applied to the medicine, in and of themselves indicate that the medicine is made from figs. The circuit court of appeals for the sixth circuit said:

"It is manifest that the term 'Syrup of Figs' used to describe a medicinal preparation has a distinct and definite meaning, namely, a combination of sugar and the juice of the fig and possibly other ingredients, *in which, however, the medicinal property of the fig is the active and chief element.*" (73 Fed R., 815.)

This is the plain common sense view to be taken of those words. If any evidence be needed for so simple a proposition, it will be found in the record. (See testimony of Harry X. Gray, p. 389; of Henry E. Hall, pp. 391-94; of James Madison Quay, 398-99; of Joseph D. Grant, p. 422; and A. Cheesebrough, pp. 425-26; of W. P. Redington, pp. 235, 238, 241; and of J. A. Bright, pp. 530-31.)

It is conceded that the appellee's medicine is not a

syrup of figs. In deciding the case at bar Judge Gilbert said:

"The appellee's medicinal preparation is not a syrup of figs. It is not made from figs, and the quantity of figs used in its preparation is so small that it must be conceded to have little, if any, perceptible effect either in promoting the pleasant taste or otherwise." (102 Fed. R., 337.)

It is shown by the testimony that the medicine contains but a fraction of one per cent. of fig juice, and that this infinitesimal quantity has no effect whatever on the compound either by way of promoting the pleasant taste or adding any medicinal virtue.

Judge Taft said in the Stearns case, 73 Fed. Rep., 816:

"*Just a suspicion of fig juice* has been put into the preparation, not for the purpose of changing its medicinal character or even its flavor, but simply to give a weak support to the statement that the article sold is syrup of figs. This is a fraud upon the public."

In view of these facts, we submit that the name "Syrup of Figs" is in and of itself a false assertion, a deceptive term, and a fraud upon the public. This evident intent to deceive is accentuated by the pictures on the labels consisting of fig branches bearing figs, and of young ladies holding figs in their hands. Plainly the idea was

to convey the impression that the medicine was made from figs.

Again, the new label says that this medicine

"Presents in the most acceptable form the medicinal laxative principles of plants known to act most beneficially to cleanse the system," etc.

What plants are referred to? The only representation of anything in the shape of a plant on the label is the fig branch. There is no statement on this label that the active principle of the medicine is senna. The public is left to infer that the active principle is figs.

And still further, the new label proclaims that the medicine will *permanently overcome habitual constipation. This is a direct and positive falsehood.* There is no medicine known to science that will permanently overcome habitual constipation. See testimony of Dr. Kerr (Rec., p. 568) and Dr. Dodge (Id., 556.)

These physicians were called for the purpose of showing the falsity of such a contention and they testify squarely to the fact. They were not contradicted, nor was there any attempt at contradiction. Therefore, as the evidence stands, it is an established fact of record that there is no medicine which will permanently overcome habitual constipation, and, consequently, this statement on the new label is a falsehood.

And finally, it is stated on the label that the juice of figs in the composition is *to promote the pleasant taste.* It will be observed that this language is printed in very small and almost illegible type. Unless a person has unusually good eye sight, he would need the aid of a magnifying glass to decipher it. It is scarcely possible that the purchaser would ever notice it, and even if he did, it is not likely that it would change the impression which had already been produced by the more striking statements and representations on the label tending to induce the belief that the medicine was made from figs.

But even this statement itself is a falsehood. It is not true that the juice of figs in the combination promotes the pleasant taste. There is such an infinitesimal amount of fig juice present that it can neither promote the pleasant taste nor have any other effect. *There is less than one-tenth of one per cent of fig juice in the medicine* (see finding of court in *California Fig Syrup Co.* vs. *Stearns*, 73 Fed. Rep., 813, and also Record, 95-6).

In one hundred gallons of the medicine there would be one-tenth of a gallon of fig juice, and in one gallon, one thousandth. Calling a spoonful fifty drops, which is excessive in actual practice, there would be in a spoonful of this medicine (an ordinary dose) just *one-twentieth of a drop* of fig juice; so that a person taking three

doses a day would at the end of one week have accumulated one drop of the juice in his system. *One drop a week* is decidedly homeopathic in quantity, and we submit that such an infinitesimal dose can have no effect either medicinally or by way of promoting the taste. It cannot be detected. The medicine would be precisely the same both as to effect and as to taste if there were no fig juice in it at all. This is admitted by Mr. Queen, the man who manufactures the medicine. (See Record, pp. 98-99-100-1.)

As was said by Judge Taft, there is just a *suspicion of fig juice* in the preparation, which was put into it, "not for the purpose of changing its medicinal character or even its flavor, but simply to give a weak support to the statement that the article sold is syrup of figs." (73 Fed. R., 816.)

And Judge Gilbert says in the case at bar, "The appellee's medicinal preparation is not a syrup of figs. It is not made from figs, and the quantity of figs used in its preparation is so small that it must be conceded to have little, if any, perceptible effect either in promoting the pleasant taste or otherwise." (Record, 642.)

Thus we see, that according to Mr. Queen, the manufacturer of the medicine, and according to the findings of the court of appeals of the sixth circuit, through

Judge Taft, and the findings of the court of appeals of the ninth circuit, through Judge Gilbert, there is but an infinitesimal amount of fig juice in this medicine, and the same has no effect whatever either medicinally or by way of promoting the pleasant taste. To put it in the exact language of Judge Gilbert, "the quantity of figs used in its preparation is so small that it must be conceded to have little, if any, perceptible effect either in promoting the pleasant taste or otherwise." It follows conclusively, therefore, in our judgment, that the statement on the new label relied upon by appellee to repel the charge of fraud, viz., the statement that the juice of the fig is put in to promote the pleasant taste, is itself a false statement. In this new label, therefore, we have the following distinct misrepresentations:

First.—The designation of the medicine as a syrup of figs; whereas, according to Judge Gilbert, it is not a syrup of figs nor made from figs.

Second.—The statement that the medicine overcomes habitual constipation; whereas, according to the medical testimony, that is impossible.

Third.—The statement that the juice of figs in the medicine is to promote the pleasant taste; whereas, according to Mr. Queen, the manufacturer of the medicine,

and according to Judge Gilbert in his decision, as well as according to the decisions of the eastern circuits, the small quantity of fig juice in the medicine does not promote the pleasant taste nor does it add anything whatever to the medicine.

And furthermore the new label has pictures of fig branches and young ladies holding in their hands branches bearing figs, all tending to create the impression that the medicine contains figs as an essential ingredient.

The answer which the court of appeals in the case at bar made to this obvious proposition is, (1). That the term "Syrup of Figs" is not deceptive, because a person who takes such a medicine must necessarily know that its virtues are not due to fig juice, and (2), If he did not know the fact, then there is to be found on the label a distinct intimation to the contrary which would correct the false impression.

The exact language used by the learned judge who rendered the opinion is as follows:

"We do not think the name 'Syrup of Figs' as applied to the appellee's preparation is in itself calculated to mislead or deceive the public to any material extent. Any one who knows enough to take medicine when he is ill, must know that a liquid medicine to be taken in small

doses as a laxative, would be worthless for the purpose intended if it consisted of nothing more than a syrup or decoction of figs. There is in the form in which the medicine is presented, the purpose for which it is used, and the size of the dose which is prescribed, sufficient to charge him with notice that the medicine contains something more than the preparation of figs. And if, indeed, he be so uninformed and ignorant that the name 'Syrup of Figs' alone conveys to him the impression that the compound is made of figs, there may be found in the carton a distinct intimation to the contrary. It is there declared that the remedy presents in the most acceptable form the medicinal laxative principles of plants known to act beneficially and that the juice of the fig in the combination is only to promote the pleasant taste."

Regarding the first reason above advanced, we think it sufficiently answered by Judge Taft. Said he, in rendering the decision in the Stearns case (73 Fed. Rep., 817):

"The argument for complainant is that because fig juice or syrup has no laxative property everybody ought to understand that when the term is used to designate a laxative medicine, it must have a fanciful meaning. But the fact is admitted that the public believes that fig juice or syrup has laxative medicinal properties. It is to them that the complainant seeks to sell its preparation, and it is with respect to their knowledge and impressions that the character, whether descriptive or fanciful, of the term used, is to be determined."

And Judge Colt said in the Putnum case (66 Fed. Rep., 751):

"It may be true as a scientific fact known to physicians and pharmacists that the syrup of figs has little or no laxative property; but this is not the belief of the general public. They purchase this preparation on the faith that it is a laxative compound made from the fruit of the fig, which is false."

We think this reasoning is unanswerable. The medicine is bought by the public at large upon the strength of the name, not on the prescription of physicians. Such purchasers have no technical knowledge of medicine, and we submit that it is not true that they would know that it would be worthless for the purpose intended if it consisted of nothing more than a syrup or decoction of figs. On the contrary, they would naturally think otherwise, because of the popular impression that figs are laxative. A physician, a pharmacist, or a professor of chemistry, might think as suggested by the learned judge of the court of appeals, but we submit that a hod carrier, a servant girl, or a bootblack might not.

As to the second answer advanced by the court of appeals in this case, viz, that there is a distinct intimation upon appellee's labels that the medicinal properties

of its medicine is not due to figs, but that the juice of the fig is only to promote the pleasant taste, we desire to reiterate what we have already said: *that this statement is in itself a false one, because the juice of the fig does not promote the pleasant taste*, for Judge Gilbert says in his opinion that the quantity used "is so small that it must be conceded to have little, if any, perceptible effect, either in promoting the pleasant taste or otherwise." And furthermore, on this point we desire to again say that, even if this statement were true, it could not in the nature of things correct the false impression conveyed by other and more prominent representations on the labels due to the name of the article and the representations of fig branches bearing the ripe fruit. These representations, added to the popular impression that figs are laxative, necessarily convey to the mind of the public at large that the laxative principle of this medicine is due to figs.

In this connection it was urged by the appellee's counsel in the court of appeals, and will doubtless be urged by him here, that the appellee has published to the world the fact that the basis of its medicine is senna. These advertisements appear to have been inserted mostly in medical journals. It is scarcely possible that the public at large would ever see or read such journals, as they are

read mostly by medical men. But irrespective of that, the fact still remains that the *labels* of the appellee, by which its medicine is sold, do not contain that statement. It is by the labels that the rights of appellee must be gauged, and not by the advertised statements in medical journals disconnected from the labels and the sale of the medicine itself. If a person is selling an article under a fraudulent name, trade-mark, and label, and is enabled to make his sales by reason of such fraud connected directly with the sale of the medicine itself, he cannot be relieved from the charge of fraud in a court of equity by pointing to the fact that he has advertised in certain medical journals of limited circulation statements tending to contradict the false impression conveyed by the name, trade-mark and labels of his article. The fraud inheres in the name, trade-mark, and labels themselves as directly connected with the sale of the medicine.

We believe the record shows that the appellee also inserted advertisements in journals and papers other than medical, but, if we remember aright, in those advertisements there was no statement that the active principle of the medicine was senna, except in one or two instances.

Taking all these things together, we assert, without fear of successful contradiction that this new label is

fraudulent and deceptive under the decisions rendered by this and other courts. They are so numerous that they will fill a book; but we venture to refer to two which are so aptly in point that they would seem amply sufficient for a correct disposition of the case. We refer to *Brown Chemical Company* vs. *Meyer*, 139 U. S., 540, and *Schmidt* vs. *Bricg*, 100 Cal., 673.

In the first of these cases it was held by this court that the name "Brown's Iron Bitters" could not be lawfully appropriated as a trade-mark because it was so far indicative of the ingredients, characteristics, and purposes of the medicine as to be incapable of lawful appropriation by way of trade-mark. In other words, the name was *ex vi termini* descriptive. If the defendant in that case had asserted that the name was not descriptive because the bitters contained no iron, who is there so little versed in law as not to know what would have been the ruling?

The second case quoted, *Schmidt* vs. *Bricg*, 100 Cal., 673, involved the asserted right of appropriating the words "Sarsaparilla and Iron" as applied to a drink. Following the decision of this court in *Brown Chemical Co.* vs. *Meyer*, above quoted, the Supreme Court of California held that the words "Sarsaparilla and Iron" were in and of themselves so far descriptive that they could

not be appropriated as a trade-mark. In answer to that contention the plaintiff in the case argued that his beverage was not made from sarsaparilla and iron, and that it contained such an infinitesimal quantity of sarsaparilla and iron that it did not give to the compound any distinctive characteristic, and, therefore, the name was purely fanciful. This is the precise argument put forth by the California Fig Syrup Company; but the California Supreme Court was not impressed with the argument in that regard and held it to be unsound. In rendering their decision they said:

"But it is claimed by respondents (plaintiffs below) that the words 'Sarsaparilla and Iron' do not, in fact, indicate the character, kind, or quality of their beverage; that it is not a composition of sarsaparilla and iron, but a solution of various substances; that it contains only a small quantity of iron, and the name was given to the beverage only as a name by which it might be known, without in any way being descriptive; but it is sufficient to say in answer to this claim that the name given to the article is either generic, or it is of such a character that it can as well be applied to defendants' beverage as to the plaintiffs."

This clearly expresses the established law on the subject and is based on the leading case of *Manhattan Medicine Co.* vs. *Wood* (108 U. S., 218). Others of similar import are *The Leather Cloth Case* (4 De Gex J. & S., 137;

and 11 H. of L. Cas., 523), *Clotworthy* vs. *Schepp* (42 Fed. R., 62), *Alden* vs. *Gross* (25 Mo. App., 123), *Connell* vs. *Reed* (128 Mass., 477), *Siegert* vs. *Abbott* (61 Md., 276), *Seabury* vs. *Grosvenor* (14 Blatchf., 262), *Krauss* vs. *Peebles* (58 Fed. R., 585), *Mfg. Co.* vs. *Beeshore* (59 Fed. R., 572), *Fetridge* vs. *Wells* (13 How. Pr., 385), *Phalon* vs. *Wright* (5 Phila., 464), *Prince* vs. *Paint Co.* (135 N. Y., 24).

We do not need to go far to ascertain the reason why the California Fig Syrup Co. desires to convey the impression to the public that its medicine is composed of figs, or at least contains a substantial proportion of fig juice. The record on this subject is clear.

It is a known fact that there is a popular impression amongst people at large that figs have laxative properties. This impression has been known to exist from time immemorial, and is so firmly fixed that this court may possibly take judicial notice of it. But whether this court would take such notice of it or not, the testimony in the case proves it conclusively, for witness after witness testified to the existence of such popular impression. As a matter of fact this popular theory is a false one. Fig juice is not laxative. The medical men tell us that the seed and the skin of the fig may possibly be slightly laxative, when eaten in large quantities, just as

bran or oatmeal, by reason of the mechanical or grinding action upon the coating of the intestines. Even that is disputed by some medical authorities. But however that may be, it is conceded by all medical men that fig juice is not laxative. The appellee puts in his medicine no part of the seed or the skin of the fig, but merely an infinitesimal part of its non-laxative juice. The public, however, does not know this. They think that fig juice is laxative, and when they hear the term "Syrup of Figs" used, as applied to a laxative medicine, they naturally conclude that the medicine is made from fig juice, and that it has laxative properties. It was for the purpose of trading upon this popular, but false impression, that Mr. Queen adopted the name "Syrup of Figs." There is no question of this. There can be no other explanation.

In the statement of facts made by Judge Taft in the Stearns case (73 Fed. Rep., 813), we find the following:

"The popular impression that figs are laxative by reason of any medicinal element contained in them is erroneous. Their laxative effect, when eaten in some quantities, is caused by the physical action of the seeds and skin upon the bowels. There is practically no laxative property in the juice of the fig any different from the juice of any other fruit. It has no effect whatever unless taken in quantities as great as that of a pint or a quart."

And Judge Swan, in the same case in the lower court said (67 Fed. R., 1014):

"There can be no doubt, therefore, either that the complainant's preparation is not in fact compounded of the juice of the fig, but its principle is senna, or that its name was adopted and is used for the purpose of trading upon the popular fallacy that the juice of the fig in medicinal doses is an effectual remedy for constipation—an impression which is admitted to be without foundation —or that the ordinary purchaser buys the compound as and for the fruit remedy which it is advertised and asserted to be."

The basis of appellee's medicine is the well-known drug called *senna*, which has highly laxative properties. With this Mr. Queen compounds certain aromatic and saccharine substances, which he in his testimony bunches together under the nebulous term "aromatic carminatives." In this way he has produced a laxative medicine, whose basis is *senna*, and has called it by the deceptive term "Syrup of Figs" for the purpose of trading upon the popular but erroneous impression of the public that figs are laxative. All the indicia of the labels tend to show this. The name "Syrup of Figs," the name of the company, "California Fig Syrup Company," the picture of the young lady holding up a fig branch with ripe figs thereon, all support our theory. Mr. Queen could have had no other motive in view than that which

we attribute to him. His medicine could more properly be termed a syrup of senna. By no process of honest reasoning can it be called a syrup of figs.

Judge Colt says: "The compound is not a syrup of figs. It might more properly be termed a syrup of senna, etc." (66 Fed R., 750.)

Judge Taft says: "Just a suspicion of fig juice has been put into the preparation." (73 Fed. R., 816.)

Judge Gilbert says that this medicine "Is not a syrup of figs. It is not made from figs." (102 Fed. R., 337.)

As further showing the intention of appellee in this regard we again refer to the testimony of George Alt (Record, 326-346-8-9, 250-1, 356-7) who avers that he was one of the incorporators of the California Fig Syrup Co. and president thereof from June, 1882, to October, 1883; that he personally manufactured the medicine in Nevada, under the direction of Mr. Queen, for nearly two years, and was thoroughly familiar with the formula; that no figs whatever were used in the medicine, but Mr. Queen delivered to him an old gunny-sack full of figs and instructed him to expose them to view in the factory, so that the public would get the impression that figs were actually used, and in accordance with these orders he did expose the figs to public view.

In view of all these facts, it seems impossible to avoid the conclusion that this name is in and of itself a fraudulent representation.

III.

QUESTION OF UNFAIR COMPETITION IN TRADE.

The lower court erred in holding that there had been unfair competition in trade by reason of simulated labels and wrappers.

The doctrine of unfair competition in trade is that no one shall be permitted to dress his goods in such shape, form, and appearance as to enable him to sell and pass them off as and for the goods of another. Consequently, the question to be determined in such cases is the similarity between the labels. If the labels of the defendant are so similar in form and appearance to those of the plaintiff as to create confusion in the market, so that by the use of these simulated labels the defendant is enabled to sell his goods to which they are attached as and for the goods of the other manufacturer, then there is unfair competition in trade. Or, to put it in other words, there is in such case an infringement of the label. The question depends entirely upon the similarity of the labels and the possibility or probability that the one will be taken for the other.

Of course, if the labels are so dissimilar that they are readily distinguishable and the purchaser will not take the one for the other, then there is no unfair competition, no infringement. The question is purely one of fact.

In the case at bar there is no showing that any one has ever been actually deceived by the appellant's labels. Certainly, Clinton E. Worden & Co., the manufacturers, have never deceived any one, because the goods were made by them on orders from retail druggists who knew that they were not purchasing the appellee's article.

Nor was any actual deception shown to have been perpetrated by the other defendants, the retail druggists, who sold the medicine. The evidence shows that they kept in stock not only the article put up by Worden, but also that of the appellee, and that when a purchaser wanted "Syrup of Figs," he was given his choice to take either the one or the other. If he preferred the appellee's article, he took that. If he preferred Worden's, then he took that; but in no case did these druggists sell Worden's article as and for that of the appellee. On this point the appellee is bound by the testimony which it produced in its own behalf. Two of the retail druggists, defendants herein, were called by the appellee as witnesses, and they both testified as above stated.

J. A. Bright, the first one, testified on page 525 *et seq.* and 535 *et. seq.*, that he kept both articles in stock; that sometimes a purchaser called for one and sometimes for the other, and in each case received what he called for; that he never tried to pass off the one for the other; that he was entirely fair, open, and above board with his customers; that he could truthfully say that he did not deceive his customers by trying to pass off one for the other.

T. F. Bacon testified at pages 544 and 546 substantially to the same effect regarding the sales made by him, showing that he never tried to pass off the Worden syrup as that of the appellee; that he never deceived any one in that regard; that none of his customers who bought the Worden syrup were deceived into buying it or did buy it as and for that of the appellee, but that it was a matter of choice with them as to which one of these two articles they would buy.

From the foregoing it is perfectly apparent that the Worden "Syrup of Figs" was sold openly, fairly, and above-board in the usual and ordinary course of business, and was never passed off for the syrup of the appellee. In other words, there was no *actual* deception as a matter of fact. Therefore, the only question for consideration is the probability that the Worden label could be

used by unscrupulous druggists to deceive their customers into thinking that it was the genuine. This question must be determined by a comparison of the labels themselves. Copies of the labels are attached to the record in the shape of a folder opposite page 634. The defendants have used three separate styles of labels marked on the folder as Complainant's Exhibits "I," "D," and "U."

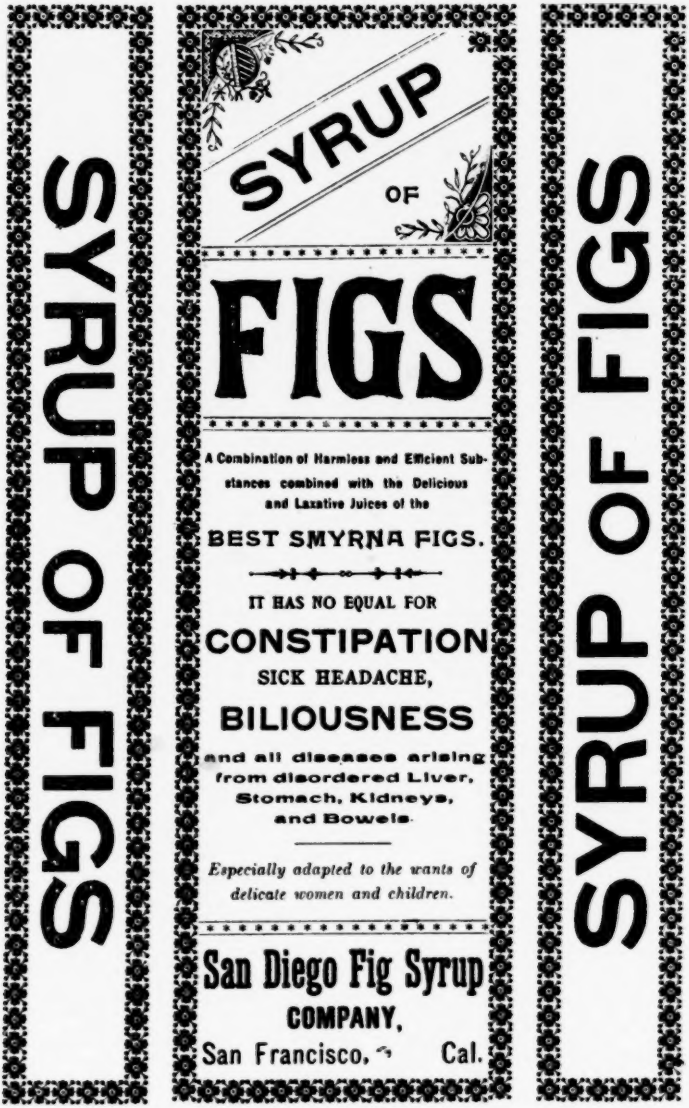
Concerning Exhibit "I," there certainly can be no question. It is so entirely dissimilar in every respect from the label of the appellee that no one having even the slightest intelligence could be deceived thereby. It is reproduced on the folder opposite page 634 of the Record. A mere glance at it is sufficient proof of this assertion.

The next label of the appellants is represented by the Complainant's Exhibit "U," likewise reproduced on said folder. Here again we find an entire dissimilarity in form and appearance from that of the appellee, such dissimilarity, in fact, as would prevent the said labels from being passed off as that of the appellee. The title of the medicine on this label, Exhibit "U," is "California Fig Syrup." While it is true that the appellee has no title to the term "California Fig Syrup," it is barely possible that some unusually ignorant purchaser might be led to suppose that the said Exhibit "U" was the label of the

appellee, from the fact that the name of the appellee as a corporation is "The California Fig Syrup Company." This is a very vague possibility, and we do not believe it would ever occur, but in order to show the fairness of Clinton E. Worden & Co., we discontinued the use of the label, Exhibit "U," and agreed never to use it again, *even before any injunction was granted.* The facts attending the use of Exhibit "U," are, that those labels were designed by an employe of the firm, and a very limited number of them sold, only one gross, before Mr. Worden was made aware of the fact; but when his attention was called to it, he ordered their immediate discontinuance, because they contained the words "California Fig Syrup." While he contended, and does now contend, that he is entitled to use the words "Fig Syrup," he did not think he had a right to prefix it with the word "California" and call it "California Fig Syrup," thinking that that might be an interference with the rights of the appellee. (Record, 438, *et seq.*)

But whatever may be the facts, we discontinued the use of that label Exhibit "U," before an injunction was granted and do not intend to use it again, even though this case be decided in our favor. It is a matter of very small moment and not worth discussion. Only one gross was used and no more will ever be used. *De minimis lex non curat.*

Complainant's Exhibit "D."


SYRUP OF FIGS
SYRUP
OF
FIGS
A Combination of Harmless and Efficient Substances combined with the Delicious and Laxative Juices of the
BEST SMYRNA FIGS.
IT HAS NO EQUAL FOR
CONSTIPATION
SICK HEADACHE,
BILIOUSNESS
and all diseases arising from disordered Liver, Stomach, Kidneys, and Bowels.
Especially adapted to the wants of delicate women and children.
San Diego Fig Syrup
COMPANY,
San Francisco, Cal.
SYRUP OF FIGS

The principal label in controversy is represented by Complainant's Exhibit "D" attached to the folder in the record; that label we desire to use and claim a right to use. It is reproduced on the adjoining page. Its only similarity to the label of the appellee is in the use of the words "Syrup of Figs." If the court decides that the appellee cannot monopolize those words, then the use of them on the labels in question cannot be prohibited, unless the remainder of the label is so similar to that of the appellee as to cause confusion in the trade. A comparison of the said label, Exhibit "D," with the appellee's label, Complainant's Exhibit "A," shows clearly that there is such dissimilarity between the two that there is no likelihood that the one will be taken for the other. It would be a useless waste of time for us to point out the differences. The labels speak for themselves and the court can see whether they are similar or not. In order, however, that they may be conveniently compared we reproduce them side by side on the folder at end of this brief.

But even if there were such similarity between the labels of appellant and appellee as to entitle the appellee to an injunction on the score of unfair competition, the appellee is disentitled to any such relief by reason of its fraudulent representations and practices regarding its medicine heretofore adverted to when discussing the

question of trade-mark. If there be fraud on the part of a complainant, he is not entitled to protection for his label any more than for his trade-mark. In that respect trade-marks and labels stand on the same footing. It would be a waste of time to dwell on this subject of fraud any further, as we have already discussed it, and, therefore, we merely refer to the matter.

IV.

PRIOR ADJUDICATIONS.

There has been much litigation during past years concerning this name "Syrup of Figs." Some of the cases were in the eastern circuits and two in the ninth circuit.

The first decision rendered in the eastern circuits was that of *California Fig Syrup Company* vs. *Putnam* (66 Fed. Rep., 759), decided by Judge Colt in the circuit court for the district of Massachusetts on March 6, 1895. That case involved the asserted right to use the words "Syrup of Figs" as a trade-mark. There was no question concerning labels or unfair competition in trade. The sole point in issue was whether or not said words "Syrup of Figs" could be appropriated as a trade-mark. In deciding the case Judge Colt said:

"If this preparation is in fact a syrup of figs, the words are clearly descriptive, and not the proper subject

of a trade-mark. Upon this point the contention of the plaintiff is that its preparation is not a syrup of figs, since it contains only a very small percentage of the juice of the fig; that the laxative ingredient in it is senna; that while the fig in the form of fruit may have laxative properties arising from the seeds and skin, the fig in the form of a syrup is no more laxative than any other fruit syrup; that it follows from these facts that these words as applied to this compound are not descriptive, but purely fanciful, and therefore constitute a valid trade-mark. The evidence shows that the compound is not a syrup of figs. It might more properly be termed syrup of senna, if the words were intended to be descriptive of the article. But assuming that this is not a syrup of figs, we are met with the inquiry whether these words as applied to this preparation are not deceptive."

The learned judge then proceeds to reproduce in his opinion the familiar cut of the California Fig Syrup Company, consisting of a young lady holding a fig branch in her hand, and quotes from the label used in connection therewith. He then continues his opinion as follows:

"The popularity of this medicine arises from the belief in the minds of the ordinary purchaser that he is buying a laxative compound, the essential ingredient of which is the California fig, whereas, in fact, he is buying a medicine the active property of which is senna. The ethical principle on which the law of trade-marks is based will not permit of any such deception. It may be true, as a scientific fact known to physicians and pharmacists, that the syrup of figs has little or no laxative properties; but

this is not the belief of the general public. They purchase this preparation on the faith that it is a laxative compound made from the fruit of the fig, which is false. This is not an immaterial representation, the effect of which is harmless, but it is a representation which goes to the very essence of the plaintiff's right to a trademark in these words. The cases are numerous where the courts have refused to grant relief under these circumstances."

Many of the leading cases are then cited in the opinion, and copious quotations taken therefrom, upon the strength of which authorities the bill was dismissed.

An appeal was taken by the California Fig Syrup Co. in that case, to the circuit court of appeals, where the judgment was affirmed by Judges Putnum, Nelson, and Aldrich. The opinion is very short and reads as follows:

"Per CURIAM. We agree with the reasoning and the conclusions of the circuit court in this cause, but we do not wish to be understood to approve all the cases cited in this opinion. It is sufficient to refer to *Medicine Co.* vs. *Wood*, 108 U. S., 218, and to the underlying principles of *Church* vs. *Proctor*, 13 C. C. A., 426, 66 Fed., 240, decided by this court February 2, 1895, as supporting the line of reasoning found in that opinion. The decree of the circuit court is affirmed."

California Fig Syrup Company vs. *Putnum*, 69 Fed. Rep., 741.

The second case is that of *California Fig Syrup Company* vs. *Stearns*, 67 Fed. Rep., 1008, decided by District Judge Swan for the eastern district of Michigan. It is there said:

"It is apparent from these facts that if the equities of the parties are dependent upon the quantity of fig juice which enters into their respective preparations, they largely preponderate in favor of defendant. It is equally apparent that complainant makes and sells its wares to the public under the representation that the active and controlling ingredient is derived from the fig, while in fact, under its own proofs, the juice of that fruit has no medicinal value and is lacking in the potency required for a laxative. * * * * The relief prayed by complainant is in truth the privilege of selling its preparation of senna under the name of 'Fig Syrup.' Whatever the virtues or popularity of complainant's specific, there is no ground on which such relief can be granted."

Consequently, the bill was dismissed. The case was appealed to the circuit court of appeals, and will be found reported in 73 Fed. Rep., 813, where it was affirmed by Judges Taft, Lurton and Hammond. The opinion was rendered by Judge Taft, and amongst other things he says:

"It may be that no one had ever made a syrup of figs at the time that Queen selected the term to designate the preparation which he put upon the market. That is immaterial. It is entirely possible to describe something

by the use of common words which may never have had a commercial use, or which may never have been in fact made. * * * It is manifest that the term 'Syrup of Figs' used to describe the medical preparation, has a distinct and definite meaning, namely, a combination of sugar and the juice of the fig, and possibly other ingredients, in which, however, the medicinal property of the fig is the active and chief element. * * The term 'Syrup of Figs,' therefore, cannot be used as a trade-mark. * * But the second ground presented, and that upon which the court below rested its decision, prevents the complainant from having any relief at all. That ground is that the complainant has built up its business and made it valuable by an intentional deceit of the public. It has intended the public to understand that the preparation which it sells has, as an important medicinal agent in its composition, the juice of California figs. This has undoubtedly led the public into the purchase of the preparation. The statement is wholly untrue. Just a suspicion of fig juice has been put into the preparation, not for the purpose of changing its medicinal character, or even its flavor, but merely to give a weak support to the statement that the article sold is syrup of figs. This is a fraud upon the public. It is true it may be a harmless humbug to palm off upon the public as syrup of figs what is syrup of senna, but it is, nevertheless, of such a character that a court of equity will not encourage it by extending any relief to the person who seeks to protect a business which has grown out of, and is dependent upon, such deceit. It is well settled that if a person wishes his trade-mark property to be protected by a court of equity he must come into court with clean hands, and if it ap-

pears that the trade-mark for which he seeks protection is itself a misrepresentation to the public, and has acquired a value with the public by fraudulent misrepresentation in advertisements, all relief will be denied to him. This is the doctrine of the highest court of England, and no court has laid it down with any greater stringency than the Supreme Court of the United States. * * The argument for complainant is that, because fig juice or syrup has no laxative property, everybody ought to understand that when the term is used to designate a laxative medicine it must have only a fanciful meaning. But the fact is admitted that the public believes that fig juice or syrup has laxative medicinal properties. It is to them that the complainant seeks to sell its preparation, and it is with respect to their knowledge and impressions that the character, whether descriptive or fanciful, of the term used, is to be determined. Exactly this question raised against the same complainant was considered by the circuit court for the district of Massachusetts (*Syrup Co.* vs. *Putnam*, 66 Fed., 750), and relief was denied by Judge Colt to the complainant on the ground that its use of the term 'Syrup of Figs' was a misrepresentation to the public, and a fraud upon it. The case was carried to the court of appeals, and affirmed upon the opinion of the circuit judge."

We thus see that in two circuit courts and in two circuit courts of appeal, and by eight different judges, the views which we have advanced concerning this trade-mark have been sustained.

The effect of these decisions was sought in the lower

court to be counteracted by the case of *California Fig Syrup Company* vs. *Improved Fig Syrup Co.* in the ninth circuit. The decision of the lower court in that case is reported in 51 Fed. Rep., 296, and was rendered by His Honor Judge McKenna while circuit judge. That case came up on demurrer to the bill and motion for a preliminary injunction, and was heard on affidavits. It appeared that the defendants, some of whom had been formerly associated with the California Syrup Co., had formed a corporation called the "Improved Fig Syrup Co.," and had adopted a label for its goods which, according to the opinion of Judge McKenna, was "identical in form, size and in device," with that of the complainant. The relief granted in that case was distinctly based on the ground of unfair competition in trade, and not on the ground of trade-mark. *Judge McKenna did not hold or decide that the words "Syrup of Figs" were a lawful trade-mark.* The question of legality of such a trade-mark was not passed on. It was utterly immaterial on that motion whether the words were descriptive or not, and there was no showing that they were fraudulently used so as to disentitle them to protection. In rendering his decision Judge McKenna said:

"But respondent urges that the words 'Syrup of Figs'

are descriptive and that complainant deceives when it uses them to designate its compound. *The deceit does not appear on the face of the bill, and it is unimportant if they are descriptive.* The question is now, not whether complainant has the exclusive right to use the words 'Syrup of Figs' or 'Fig Syrup,' but it is whether respondent has, by use of them and other words, and by the other limitations alleged and exhibited, so far imitated the form of complainant's device and description to represent its goods and appropriate its reputation and trade. The *gravamen* of the action is the simulation of complainant's devices and the deception of purchasers."

Consequently, the demurrer was overruled and the preliminary injunction granted. It thus distinctly appears that in that case *Judge McKenna did not decide that the words "Syrup of Figs" were a legitimate trade-mark*, but merely that the labels adopted by the defendant, being identical in form, size and device with those of the complainant, constituted unfair competition in trade. The question of fraud was not in issue, according to the opinion, and was not passed on, and we do not see how any different decision could have been rendered in that case on the record there presented.

That case went to the court of appeals and was affirmed. It is reported in 54 Fed. Rep. at page 175, the decision being rendered by his Honor Judge Beatty. The appeal was taken from the order of the lower court

granting a preliminary injunction, and that order was affirmed. So far as the question of deception and fraud is concerned by the use of the words "Syrup of Figs," the court made no adjudication, for the simple reason that the fraud and deception were not made to appear. Said Judge Beatty in rendering his decision:

"It is next urged that the appellee has no standing in a court of equity, because in the representation it has made concerning its medicine it has practiced deceit and fraud upon the public. *If this were clearly established by the evidence, it would be ground for reversal.* Trade-marks which are based on misrepresentations and deceit, and especially such as are intended to deceive and defraud the public into the purchase of articles for what they are not—into the belief they are valuable, when deleterious—will not be protected by the courts. There is too much reason for the assertion that 'there is not a thing that we eat or drink or wear which is pure or genuine.' To protect a dishonest manufacturer in a fraudulent and deceptive trade-mark would be simply to aid him in fraud; to add to his unlawful gain by assisting him in palming off upon the public his worthless wares as valuable, and thus discourage, injure and bankrupt the honest dealer, as well as to impose upon the public. Upon a proposition so plain discussion or the citation of authorities would seem unnecessary, but we may in this connection refer to *Medicine Co.* vs. *Wood*, 108 U. S., 218, and the cases therein cited. While we agree with appellants as to the doctrine, we are not satisfied from

the evidence that the appellee has attempted to practice any fraud or impose upon and damage the public."

The conclusion was eminently proper in that case, because the demurrer to the bill admitted the truth of its allegations, and there was certainly no showing in the bill that the words were used deceptively. Under such circumstances the court could not possibly have held otherwise; but if the case had been brought up upon full proofs showing the deceptive character of the words, as has been done in the case at bar, there would probably have been a different decision. The weakness of the appellant in that case consisted in taking the case up on a motion for an injunction before proofs on final hearing had been submitted.

That the sole point decided by the court of appeals in that case related to unfair competition in trade is manifest from the following part of his decision:

"As we construe the restraining order of the court below, it simply excludes the use by appellant of trademarks, bottles, wrappers, and devices used in offering their preparation to the public similar to those applied by the appellee to its preparation for a similar use and purpose. Appellants are not restrained from making their medicine, but from offering for sale or selling it under such or any circumstances, declarations, or representations that it may be taken as the preparation made and offered to the public by the appellee. * * *

We think the facts before the lower court clearly justified the conclusion as reached, and its order and judgment, so far made, are affirmed."

It is apparent from the foregoing that the court passed on nothing else than the question of unfair competition in trade caused by simulated labels and wrappers, and in so passing upon that question did not consider the question of fraud and deception, the question which we are now raising, because that question was not involved in that case. Therefore, the decision of the court of appeals in that case is not in conflict with the views heretofore advanced by us nor with the decisions of the eastern circuits.

There is, however, one portion of the decision in that case which the appellee relies upon as an adjudication that the words "Syrup of Figs" are a valid trade-mark. Such a question as that, however, was not involved in the case, and any remarks made thereon by the learned judge who wrote the decision is mere *dictum* and not binding on us, who were not parties to that case and had no opportunity to be heard. The portion of the decision referred to begins on page 178 of the report and reads as follows:

"The phrase 'Syrup of Figs' is in no sense a generic one. It is not a name of a natural product, or of a class

of natural products. If such an article exists, it must be the result of a manufacturing process. So far as we are advised the name never existed, nor was it applied to any natural or artificial product, until formulated by appellee of words of no prior association, and by it used to designate its preparation. Even if such medicine were made entirely of figs, it is still a new name, applied to a manufactured, and not a natural, product; hence, indicates rather its origin, than its quality or even its name. It is not, however, claimed by the appellee that its preparation is a product of figs alone, but that it is produced from a combination of the juice of figs with other plants. In this light the phrase is not 'merely descriptive of an article of trade, of its qualities, ingredients, or characteristics.'"

If by this language the learned judge meant to hold that the words "Syrup of Figs" were not descriptive and were, therefore, the subject of a lawful trade-mark, we submit that it was mere *dictum*. No such question was necessarily involved on that hearing. Judge McKenna expressly held in the lower court that it was utterly immaterial, for the purposes of that case, whether the words were descriptive or not, because the sole ground of relief was unfair competition in trade. The court of appeals affirmed the judgment in that case, and such affirmance did not extend to anything which was not decided in the lower court.

In the case of *California Fig Syrup Co.* vs. *Putnam*, 66 Fed. Rep., 754, the court says:

"The plaintiff relies on the decisions of the circuit court for the northern district of California, and the circuit court of appeals for the ninth circuit in a case brought by it against the Improved Fig Syrup Company (51 Fed., 296, and 4 C. C. A., 264, 54 Fed., 175.) That case, however, was only heard on motion for preliminary injunction; it also presented a different state of facts."

The "different state of facts" referred to by Judge Colt included an absence of any showing of fraudulent representations by the appellee as to the constituents of its medicine. Had such showing been made before the court of appeals in the Improved Fig Syrup case, then the facts of the two cases would have been more nearly alike, and the two decisions would have been in conflict. The different state of facts, however, as shown by Judge Colt, shows that the two decisions are not conflicting.

The decision of the court in the Improved Fig Syrup case was also examined by Judge Swan in the case of *California Fig Syrup Co.* vs. *Stearns*, 67 Fed. Rep., 1015. He takes precisely the same view as we have heretofore advanced, viz., that the court rendered its decision in the Improved Fig Syrup case on the ground of unfair competition in trade. After showing that by copious quota-

tions from the opinion, the learned judge proceeds as follows:

"It is true that the court of appeals discusses at some length the character of complainant's trade-mark; yet with all deference to the opinion of the learned court, it would seem from its concluding paragraph, quoted *supra*, that its expression upon this point (i. e., trade-mark proper), was not necessary to the decision of the case presented, and that the true ground for the relief granted was the manifest equity of complainant to have the defendant restrained from unfair trade independent of the question arising upon the validity of the trade-mark in controversy."

We submit, therefore, that the decision rendered by his Honor Judge McKenna in the Improved Fig Syrup case and affirmed on the appeal, is not in conflict with the eastern decisions.

The last decision is that rendered in the case at bar, which is squarely in conflict with the eastern decisions. It is for this court to say which is correct.

V.

THE MATTER OF ACCOUNTING.

That portion of the decree which awards an accounting is erroneous and should be reversed.

The portion of the said decree referred to reads as follows:

"And it is further ordered, adjudged and decreed that the complainants do have and recover of and from the said defendants * * * * * * the *profits, gains and advantages* which said defendants or either of them have received or made or which have arisen or accrued to them or either of them from the infringement of the rights of complainant by using said name and by the making, using and selling, or the making, using or selling of said liquid laxative medicine, having placed thereon the name 'Syrup of Figs' or 'Fig Syrup,' or any other name in imitation of complainant's said medicine."

There is in the decree no award of *damages*, nor any accounting thereof, merely an award of *profits*.

Such a decree as this is erroneous. Possibly the learned counsel, in drafting the decree, had in mind the rule of law which obtains in patent cases, to wit, that a successful complainant is entitled to recover in equity the profits realized by the defendants from the infringement as well as the damages sustained by the complainant, and he must have thought that by analogy such a rule obtains in a trade-mark case. But in this he errs. There is no such provision.

The provision in relation to patents is purely statutory. By section 4919 of the Revised Statutes it is provided that a patentee may in an action on the case recover damages for the infringement of his patent, and section 4921 provides that a patentee in a suit in equity

is entitled to recover both damages and profits, that is to say, the damages suffered by him and the profits realized by the defendants. These provisions are purely statutory and relate only to patents.

In regard to trade-marks there is no such statutory provision. The complainant sues on his common-law right, bringing his suit in the federal court on the ground of diverse citizenship of the parties. In such case, all that he can recover, whether he sue at law or in equity, is the damages he has suffered, and those must be the actual damages. Now there are various modes for measuring those damages, dependent upon the facts of each particular case. Lost sales and enforced reduction in selling prices, and matters of that kind are generally resorted to, and furnish more or less reliable standards for measuring a plaintiff's damages. If it can be shown by him that the infringing competition resulted in a loss of sales by him, and if he can show the extent of such loss of sales and the profits he would have made thereon, or if he can show that he was forced to reduce his selling prices and thereby lost on the goods which he actually sold, he thereby furnishes some reliable basis for measuring his damages. But in all these cases it is the actual *damage* suffered by him which he recovers.

The defendant's profits are not necessarily the measure of plaintiff's damages, because it does not follow that the plaintiff would have made those profits if the defendant had not infringed. This is too palpable to admit of discussion.

Now the decree is that the complainant recover "the profits, gains and advantages" which the defendants "have received or made, or which have arisen or accrued to them * * * from the infringement."

All that the complainant would have to do on the accounting would be to show the amount of those "profits gains, and advantages," and thereupon he would be entitled to judgment therefor, without showing that those profits were the measure of his damages. In other words, he would recover the defendant's profits *as such*, without regard to his own damages. His actual damages may have been less than the defendant's profits, or he may have suffered no damages at all, and yet under this decree he would be entitled to recover the defendant's profits, regardless of every other question. We submit that such a decree is erroneous.

Were this a patent case, the rule would be different, because the patent act expressly authorizes the recovery of defendant's profits. Being a trade-mark case, how-

ever, founded on a common-law right, the complainant is not entitled to recover the defendant's profits as such.

But, furthermore, there is another reason why this portion of the decree is erroneous. There is no allegation in the bill of complaint that the defendants have ever realized any profits from the infringement. There is an allegation that the complainant was damaged in the sum of ten thousand dollars by reason of the infringement, but there is no allegation that the defendants realized any profits. For aught that appears from the bill the defendants may have lost money by the infringement, and there is no proof that they made any profits. While that fact would not have prevented a recovery of complainant's damages, it certainly prevents any recovery of profits. Therefore it was clearly an error to enter a decree for profits. A complainant is supposed to state in his bill what he sues for, and if he maintains his case, he is entitled to a judgment accordingly; but he certainly is not entitled to a judgment for something that he does not sue for. That is the posture of affairs in this case. Complainant did not allege any profits; but, nevertheless, the court awarded him a decree for profits. It was just as much of an error to award him a decree for profits under such circumstances as it

would have been to have awarded him a decree quieting his title to real estate.

Were any authority needed for so simple a proposition, we would refer to 3 Robinson on patents, section 1106, and Walker on patents, section 579.

In the first citation it is said:

"A bill in equity, in actions for infringement, must disclose the substantial ground work of the case and contain averments covering every material fact, *the court having no authority to consider what is proved and not alleged*, or what is alleged and not suported by the evidence."

In the second citation, speaking of the necessary averments of a bill, the author says:

"And when profits are sought to be recovered, it (the bill) must plainly aver that profits were realized by the defendant on account of the stated infringement. This last allegation has heretofore been sometimes omitted from bills in patent cases, but the omission would always have been a fatal one, if the defendants had availed themselves of it. The necessity for such an allegation follows from the rule of patent law that, where a particular infringer made no profits from his infringement, no profits can be recovered from him, and from the rule of equity pleading, that every fact which is necessary to entitle a complainant to the relief for which he prays, must be distinctly and expressly averred in the stating part of his bill."

These citations refer to patent cases, but their application to the case in hand is sufficiently apparent.

The court of appeals declined to consider this point for the reason that there was no assignment of error covering the same. We think, however, that it is such a plain and palpable error that it can well be considered under the general rule that "the court at its option may notice a plain error not assigned." (Rule 2, court of appeals rules.) Certainly this court can consider it if it see fit.

In conclusion, we submit that the appellee failed to make out such a case as entitles him to any relief in a court of equity; and to recapitulate, we say:

1. *If the medicine in question contains an appreciable quantity of fig juice, then the same "Syrup of Figs" is so far descriptive that it cannot be appropriated as a lawful trade-mark.*

2. *If on the other hand the medicine contains no appreciable quantity of fig juice, then the name is ex proprio vigore deceptive.*

3. *But if the name alone is not sufficient as a basis for deception, then the pictures, illustrations, and advertisements in connection with the facts attending the adoption of the name clearly show fraudulent practices on*

the part of the appellee, such as will disentitle him to any relief in a court of equity.

4. *No case has been made out by appellee to entitle him to an injunction on the ground of unfair competition in trade by reason of simulated labels and wrappers, because the appellant's labels do not so clearly resemble those of the appellee as to constitute infringement.*

5. *It was error to award a decree for an accounting of profits because there was no allegation in the bill that profits had been realized, and because further, even if there had been any such allegation, they could not be recovered in a suit on a common law trade-mark.*

6. *The prior adjudications in the eastern circuits clearly establish the fact that the appellee was entitled to no relief, and those decisions are well founded in point of reason.*

We, therefore, respectfully ask that the decree in this case be reversed and the cause remanded to the circuit court of the United States for the Northern District of California, with instructions to dismiss the bill and enter a final decree in favor of the appellants for their costs.

JOHN H. MILLER,
PERCELL ROWE,
Counsel for Appellant.

Complainant's

Exhibit "A."

CALIFORNIA FIG SYRUP Co.
SAN FRANCISCO. CAL.

SYRUP OF FIGS

THIS EXCELLENT REMEDY PRESENTS IN THE

MOST ACCEPTABLE FORM

THE MEDICINALLY LAXATIVE PRINCIPLE OF PLANTS KNOWN TO ACT MOST GENTLY AND PERFECTUALLY; TO CLEANSE THE SYSTEM EFFECTUALLY; TO PERMANENTLY OVERCOME

HABITUAL CONSTIPATION

AND THE MANY ILLS DEPENDENT ON IT; TO DISPEL COLDS AND HEADACHES AND PREVENT FEVERS; TO ACT GENTLY YET PROMPTLY ON THE

KIDNEYS, LIVER AND BOWELS

THE JUICE OF FIGS IN THE COMBINATION IS TO PROMOTE THE PLEASANT TASTE

MANUFACTURED ONLY BY THE

CALIFORNIA FIG SYRUP Co

OF SAN FRANCISCO, CAL.

LOUISVILLE, KY. NEW YORK, N. Y.

PRICE, 50 CENTS.

REGISTERED IN PATENT OFFICE.

SYRUP OF FIGS is better than Pills, Oils, Salts and other disagreeable medicines, as it is more easily taken, more acceptable to the stomach, more gentle in its action, more beneficial in its effects, and because it acts without irritating or weakening the Kidneys, Liver and Bowels. Its efficacy and delicacy of flavor, are due to the medicinal and agreeable qualities of plants and aromatic carminatives, skillfully combined with pleasant liquids, among which may be mentioned the juice of figs. It is entirely free from every objectionable quality or substance, is adapted to young and old and therefore the best of family laxatives.

☞ FULL DIRECTIONS AND DESCRIPTION ON INSIDE WRAPPER.

FEIGEN SYRUP uebertrifft alle uebrigen Heilmittel, indem derselbe sowohl fuer Kinder wie fuer Erwachsene leicht einzunehmen ist, vom Magen leicht verdaut wird, und auf Nieren, Leber und Eingeweide angenehm und schnell wirkt, das System reinigt, Fieber und Kopfschmerzen vertreibt, Erkaeltungen hebt, so dass reines Blut, erfrischender Schlaf, Gesundheit und Kraft, natuerlicherweise folgen muessen. Derselbe ist besser als Oel, Salz, Pillen und andere bittere ekelhafte und abtreibende auf die Leber wirkende Arzneien, weil er die Organe, auf welche er wirkt, kraeftig, und ebenso heilsam ist fuer das Kind wie fuer die Mutter, fuer den Invaliden, Kranken, wie fuer den starken, robusten Mann, wenn billoes oder an Verstopfung leidend.

☞ GEBRAUCHSANWEISUNG UND BESCHREIBUNG INNERHALB DES UMSCHLAGS.

Complainant's Exhibit "D."

SYRUP OF FIGS

SYRUP OF FIGS

SYRUP OF FIGS

A Combination of Harmless and Efficient Substances combined with the Delicious and Laxative Juices of the

BEST SMYRNA FIGS.

IT HAS NO EQUAL FOR

CONSTIPATION

SICK HEADACHE,

BILIOUSNESS

and all diseases arising from disordered Liver, Stomach, Kidneys, and Bowels.

Especially adapted to the wants of delicate women and children.

San Diego Fig Syrup COMPANY,

San Francisco, Cal.

SYRUP OF FIGS

No. 192. 36

Reply Brf. of Miller for Petitioner

Office Supreme Court U.S.
FILED
MAR 18 1902
JAMES H. McKENNEY,
Clerk.

No. 192.

IN THE

Supreme Court of the United States.

Filed Mar. 18, 1902.

OCTOBER TERM, 1901.

CLINTON E. WORDEN & CO.,
Appellant,

vs.

CALIFORNIA FIG SYRUP CO.,
Appellee.

REPLY BRIEF OF APPELLEE.

JOHN H. MILLER,
For Appellant.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States.

CLINTON E. WORDEN & Co., Appellant, vs. CALIFORNIA FIG SYRUP CO., Appellee.	No. 192. October Term, 1901.

APPELLANT'S REPLY BRIEF.

I.

Appellee's Change of Position.

In our opening brief we undertook to show that the term "Syrup of Figs" could not constitute a valid trade-mark. The appellee had contended in the lower court, as we construed the argument, that those words did constitute a valid trade-mark. Such had always been the theory of appellee.

In the first case brought, *California Fig Syrup Co. vs. Improved Fig Syrup Co.* (51 Fed. R., 296), the opening sentence of the opinion is: "This is a case of infringement of a trade-mark."

And further on in the same decision it is said: "The basis of the suit is the effort of the respondent to imitate the trade-mark of the complainant."

When that case reached the Court of Appeals the same view was taken by both counsel and Court. Indeed, the syllabus of the decision (54 Fed. R., 175)

says, *inter alia:* "The phrase 'Syrup of Figs' * * * constitutes a valid trade-mark."

It is conceded that in the two cases in the First and Sixth Circuits the appellee claimed the words as a trade-mark.

In the case at bar we understand that the same claim was made in the lower court. The bill alleges that the medicine has always been "marked, named and called by your orator Syrup of Figs" (Rec., 17); that the appellee has exclusive right to the name Syrup of Figs, etc. (*Id.*, 21), and the prayer is for an injunction against selling a laxative "marked with the words Syrup of Figs," etc. (*Id.*, 27).

The Circuit Court held in the case that it involved both a question of trade-mark and unfair competition. The appellee's position is stated by the Court as follows:

"But, on the part of the complainant, it is claimed that this is not merely a trade-mark case, but that it goes further and involves unfair competition * * * in this circuit, the Circuit Court of Appeals, in the case of *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 54 Fed., 175, has, in my judgment, determined that this complainant is entitled to be protected, not only in its trade-mark, but in its business," etc., etc. (Rec., 576).

The decree entered enjoins the sale of the medicine "under the name Syrup of Figs," broadly and without regard to labels or character of packages (*Id.*, 582).

In the Court of Appeals the case was treated on the same theory. No one reading the opinion (Rec., 637-644) can fail to note this palpable fact.

It is true that the decision was based on the ground of unfair competition by reason of simulated labels and wrappers, but still the right to a trade-mark was asserted by appellee and challenged by appellant. By reason of the foregoing, we stated in our opening brief that this case was of a two-fold nature—viz., trade-mark proper and unfair competition by use of simulated labels and wrappers.

In the brief filed in this Court by appellee, the position taken in the lower Courts concerning the question of trade-mark has been abandoned, and a distinctly new theory put forward. Of course, we do not question the right of counsel to do this. It is not infrequently the case, in litigation, that eminent counsel is made to see the error of his former argument, and in such event it is the part of wisdom, as well as indicative of a broad mind, to abandon the old, and try some new theory.

In the opening sentence of appellee's brief it is said, in reference to the name in dispute :

> " The name is descriptive of the article originally put on the market, and, therefore, under many of the authorities, could not be treated as a trade-mark."

We construe this as an abandonment of the contention that the name is a trade-mark, and felicitate ourselves on the fact that our learned brother has been converted to our faith, although it be at the eleventh hour.

The position now taken by appellee is in substance as follows :

> That the name Syrup of Figs, though not a valid trade-mark proper, is a valid trade name, and, at such, will be protected on the score of unfair competition in trade.

Or, to put it in another form, a name which cannot be appropriated as a trade-mark, because descriptive, may be appropriated as a trade name, and its use *simpliciter* may be enjoined, as in the case of a technical trade-mark, without regard to the character of labels or wrappers on which it is printed. In other words, a trader, by merely calling his invalid trade-mark a trade name, is entitled to all the protection he would get if the name were a valid trade-mark.

There is no such principle of law, so far as we are aware, and certainly the learned counsel for appellee has not shown any authority therefor. But whether this name be a trade-mark or a trade-name, the rule of law is inexorable that it will not be protected if its use is tainted with fraud. A change in principle does not follow from a mere change in name. There is no magic in a name, and the appellee cannot overturn a principle of law by legerdemain of language. We care not whether the name be called trade-mark or trade-name, the rule of law is the same in either event. If the appellee has been guilty of fraud or misrepresentation in its use of the name, it has no standiag in a court of equity. Its hands are unclean, and he who hath committed inequity shall not have equity.

Permit us to examine the facts a little more in detail. It is asserted by our adversary that the name, when originally adopted in 1879, was descriptive, because it contained a large quantity of figs, and, consequently, it was a true and honest name *when originally adopted* (Brief, 2, 18).

If this be true, then the appellee's offense is worse than we ever charged it to be. It is admitted by Mr. Queen that in his earliest experiments he used large quantities of figs, but that he discovered this to be deleterious to the medicine, causing it to ferment and spoil; consequently, he discontinued using large quantities of figs and reduced them to the present infinitesimal amount, so that the name is no longer descriptive. The learned counsel for appellee would have us believe that this reduction in the amount of figs was not made until after the medicine had acquired its reputation (Brief, 9). This fact would be immaterial, if it were a fact, but it is not a fact. On the contrary, Mr. Queen testifies that during the year 1878 he made experiments, which subsequently resulted in the production of his medicine; that he first "used figs freely;" that as he progressed with his experiments he found that a large quantity of figs was deleterious,

causing the medicine to ferment, and, therefore, he reduced it to a small quantity; that, as finally prepared, the medicine had "a very small" quantity of fig juice in it, which gave no more effect than "an equal quantity of honey or some other substance" would have given (Record, 52).

He further said in his testimony: "I knew that I was not using the name generically, because figs did not give effect and character to the combination" (Record, 52).

The medicine was first put on the market at Reno early in the year 1879 (Record, 81–82).

It will thus be seen that after the experiments with large quantities of figs in 1878 and the discovery that they were deleterious, the fig juice was reduced to its present infinitesimal amount, which was of "no more value than an equal quantity of honey," and then the name "Syrup of Figs" was adopted; after which, in 1879, the medicine was first put on the market.

The above testimony of Mr. Queen contradicts point-blank and without equivocation the following statement found on page 9 of appellee's brief concerning the reduction of the quantity of fig juice in the medicine, viz.:

"But this reduction was after the name had been given in good faith, and after the demand for it required the manufacture in large quantities."

It will thus be seen that the name was not "a true and honest name when applied to the medicine" (Appellee's Brief, 2). It never was an honest name.

In our opening brief we argued that Mr. Queen, in adopting it, intended to convey to the public the impression that it was descriptive, although, as matter of fact, it was not descriptive. We here reiterate our belief in that regard. We think it too palpable for argument that such was Mr. Queen's intention. He wanted the public to think it was a medicine made from figs, in order to avail himself of the popular impression that figs are laxative, notwith-

standing the fact that his experiments had demonstrated to absolute certainty that figs in substantial quantities, sufficient to make the name descriptive, would be deleterious, and that the actual quantity of fig juice used was so infinitesimal that it " was of no more value than an equal quantity of honey." These facts would seem to dispose of Mr. Queen's pretended honest intention in adopting the name.

In this connection counsel for appellee assert (Brief 2) that we admit that the name was originally descriptive, and they cite pages 10, 11 and 12 of our opening brief. The statement is inaccurate. Our admission was that Mr. Queen *intended* the name to be descriptive when he originally selected it and used large quantities of figs. The distinction is apparent at a glance, and we marvel greatly that it was not noted by such learned counsel as those who represent the appellee.

But grant, for argument's sake, that the name was descriptive when originally adopted in 1879, as contended by counsel, nevertheless it is, beyond all doubt, that shortly after its adoption it ceased to be descriptive by reason of the withdrawal of the figs from the compound, and never has been descriptive since. In other words, however, honest it may have been at its birth, this " child of his invention," so styled by counsel (Brief, 8), grew up as, and lived the life of, a reprobate. It would, indeed, be a novel doctrine of ethics to claim palliation for the sins of one's adult years by pointing to the innocence of his birth. Whatever may have been Mr. Queen's intention in 1878 when he was experimenting, surely there can be no doubt as to his intention, as manifested by his conduct, during the twenty-four years following while selling the medicine.

The facts, in a nut-shell, seem to be about as follows : In 1878–9 Mr. Queen, desiring to take advantage of and trade upon the popular idea that figs are laxative, prepared a medicine in which he proposed to use large

quantities of fig-juice, and gave it the name syrup of figs, in order that the public might think it was made of figs and thereby be induced to buy it on account of the supposed laxative properties of figs; that he soon discovered, by actual experimentation, that fig-juice in substantial quantity was deleterious to the medicine and caused it to ferment; that, thereupon, he withdrew the fig-juice from the compound in substantial quantity and used only an infinitesimal quantity thereof, which added nothing to the medical properties of the compound, and was of no more value than so much honey; that he retained this infinitesimal quantity of fig-juice merely to be able to say that figs entered into the compound; that during the twenty-four years following its selection he has used this name for the purpose of inducing the public to believe that the medicine contained figs in substantial quantity, and therefore possessed the supposed laxative property of figs.

Our contention on this branch of the case is:

1. *If the words Syrup of Figs were claimed as a trade-mark, it could not be protected by reason of fraud, because the medicine is not a syrup made from figs.*

2. *Calling the name a trade-name, instead of a trade-mark, is nothing more than a distinction without a difference, because the rule of law against fraud applies to trade names (or for that matter to labels, packages or anything else) with the same force and in the same way as to trade-marks.*

3. *Even if this name were honest in the beginning, when originally adopted, it soon ceased to be so, and is now a fraudulent one, is in and of itself a falsehood, to such extent that equity will not protect it.*

II.

As to the Percentage of Fig Juice in the Appellee's Medicine.

The learned counsel for appellee claims that "there is no justification in the record for counsel's [our] contention that the amount of fig juice is less than one-tenth of one per cent." (Brief, 10).

In that behalf it is claimed that the amount is "a little less than one per cent." (Brief, 9).

There is no denial of the fact that Mr. Queen testified in the case against Stearns that the percentage of fig juice was as we have stated. He then testified that in one thousand gallons of the medicine there was about one gallon of fig juice (Record, 95-6). This is one-tenth of one per cent.

And in that case the Court found as a fact that there was less than one-tenth of one per cent. of fig juice present.

Syrup Co. vs. Stearns, 73 Fed. R., 813.

It is not claimed that this quantity of fig juice has been increased since then. On the contrary, we have Mr. Queen's statement that the quantity of fig juice used now is the same as it was then—viz., the soluble part of one hundred pounds of figs to a thousand gallons of the medicine (Record, 94).

He states, however, that he has since discovered that the soluble part of the fig is greater than he then calculated, and that he thinks now, in the light of his new experience, that the percentage of fig juice is "a little less than one per cent." On page 97 of the record he says that in one thousand gallons of his medicine he calculates that there would be about from seven to nine gallons of fig juice. This would be *about from seven to nine-tenths of one per cent.*

In other words, he testified in the Stearns' case that the percentage was one-tenth of one per cent., and the Court found as a fact that it was less than one-tenth of one per cent.; while in the case at bar he testified that it was "a little less than one per cent.," admitting at the same time that the amount, whatever it be, is the same now that it was then.

In this connection it is interesting to note that another witness, Louis T. Queen, a brother of Richard E., testified that there is about seven and a half or eight per cent. of fig juice in the medicine (Rec., 264); but it is evident that his testimony is not true, and is in hopeless conflict with that of his brother, who "invented" the medicine. Even the appellee's counsel takes no stock in it. It may be useful, however, in weighing the value of the witness' testimony on other points.

It is apparent that the testimony of both brothers is pure guess work. But whatever may be the percentage of fig juice, whether one-tenth of one per cent. or a little less than one per cent., the indisputable fact is that the actual amount now used is precisely the same as it was in the Stearns case, and that said amount is so minute that it adds nothing to the medicine either one way or the other.

Mr. Richard Queen says that the fig is not an essential part of the compound (Rec., 101); that the flavor of figs cannot be detected in the medicine *(Id., 99)*; that the fig juice is of no more value than an equal quantity of honey or some other substance *(Id., 52)*; that the medicine would be just as good without any fig juice at all *(Id., 98)*.

Indeed, Mr. Queen went so far as to testify that "on one or two occasions" he made the medicine without using any figs at all *(Id., 133)*.

According to Judge TAFT, there is "just a suspicion of fig juice" present.

According to Judge GILBERT, the amount is so small as to have no effect "either in promoting the pleasant taste or otherwise."

We assert, therefore, whether the percentage is one-tenth of one per cent., as claimed by us, or a little less than one per cent., as claimed by appellee, the result is the same. The use of it is a fraud and subterfuge, put there, according to Judge TAFT, "simply to give a week support to the statement that the article sold is syrup of figs. This is a fraud on the public."

III.

Original and Present Labels.

The learned counsel for appellee take us to task for asserting that the original label used by appellee was the same as that which was in use at the time of the adverse decisions in the First and Sixth Circuit (Brief, 16, 17).

We have always labored under that impression and we still believe that it is a fact; but the matter is immaterial, and we are willing, for the purposes of this case, to accept the counsel's statement, which we understand to be as follows: That the label in controversy in the Stearns and Putnam cases was adopted in may, 1889, and was used until some time in 1896—seven years—and that the label used prior to May, 1889, had no direct statement on it referring to figs, but did have the name "Syrup of Figs" and the picture of a young lady holding up a fig branch.

These facts do not change the phase of the controversy in the least. They merely show that the appellee has been deceiving the public for not quite so long a period as we asserted.

IV.

Appellee's medicine as viewed by physicians and druggists.

Quite a portion of appellee's brief is devoted to showing that physicians and druggists think highly of the medicine, and recommend it as a good remedy for constipation. On the trial appellee went so far as to call several medical men to prove the fact.

We do not consider this material. The value of the medicine as a remedy could cut no figure in the case, unless it were harmful, which we do not assert. Hence, all that portion of the brief may be dismissed from further consideration.

V.

Conduct of Clinton E. Worden & Co.

A very large part of the appellee's brief is devoted to a verbal chastisement of Clinton E. Worden & Co. for selling fig syrup, and they are charged with "stealing" the business of appellee and all kinds of fraud upon the public.

We beg to remind the learned counsel that this is not the place or occasion for the exhibition of temper or indulgence in vituperation. It is a proposition of law which this Court is asked to decide, and it can scarcely be supposed that such language will aid the Court in reaching a correct solution of that proposition of law.

And, furthermore, we venture to remind the learned counsel that the solution of the legal question involved is not dependent on, nor in any way affected by, the conduct or motives of Clinton E. Worden

& Co., but is dependent solely and entirely on the conduct of the California Fig Syrup Company. We contend that this last-named company is not entitled to protection in the name Syrup of Figs, because its conduct in connection with that name is, and for many years past has been, fraudulent. It is no answer to that proposition for the appellee to abuse its rival. They must first clear themselves of the charge of fraud before this Court will listen to their complaint. The conduct of the appellee, not that of the appellant, is the gist of the case, the fundamental point at issue. We have the highest authority for asserting that before a person should undertake to pluck a mote from his brother's eye, he should cast the beam out of his own.

VII.

Decisions Cited in Appellee's Brief.

The number of decisions cited is appalling, but they are all in the same category, and the answer to one is an answer to all. The one most relied on is *Reddaway vs. Benham* (L. R., 1896, App. Cas., 199).

In that case the plaintiff manufactured a belting from camel's hair and other ingredients. This article was stamped with the picture of a camel and the name "camel's hair" belting. There was no element of fraud on the part of the plaintiff. On the contrary, the article was made of camel's hair and the name was an honest one. It was held that the plaintiff was entitled to protection; but even the protection which was awarded was of a limited character, for the injunction was merely that the defendant should not use the words "without clearly distinguishing such belting from the belting of the plaintiff" (see form of injunction at end of the decision).

In other words, the defendant could use the words "camel's hair," but he must be careful to use them in such way as not cause the public to confuse his belting with that of the plaintiff. Suppose, however, the plaintiff's belting had not been made of camel's hair, but of horse hair, can any one doubt what would have have been the decision? Would not the Court have refused relief on the ground that plaintiff was selling horse hair belting for camel's hair belting?

Indeed this case seems to us to furnish the most cogent reason for reversing the decree in the case at bar. Reddaway stamped the picture of a camel and the words "camel's hair" on his belting, thereby asserting that the belting was made of camel's hair, and this assertion was true. The belting was made of genuine camel's hair. In the case at bar appellee stamps on its labels the picture of a fig branch and the words "Syrup of figs," thereby asserting that the medicine is a syrup made from figs. This assertion is false. Is not this a fraud, and, if so, is the appellee entitled to any relief under the doctrine laid down by the House of Lords in *Reddaway vs. Benham?* If it be a fraud to sell horse hair belting under the name comel's hair belting, we must confess our inability to understand how it can be right to sell syrup of senna under the name syrup of figs.

Take now the case of *Singer Mfg. Co. vs. June Mfg. Co.*, 163 U. S., 169. This Court there laid down the same rule of law, holding that the defendant could not be enjoined absolutely from using the name "Singer," because that was the name of an article which everyone had a right to make, but that one could be enjoined from using the name in such way as to induce the public to think that his machines were actually made by the Singer Company.

A similar ruling was made in the companion case of *Singer vs. Bent*, 163 U. S., 205.

The ruling in these two cases was followed by the House of Lords in *Reddaway vs. Benham*, cited *supra*.

We must remark of these cases, as we did of the Reddaway case, there was no fraud in the plaintiff's conduct. Its machines were the genuine Singer machines of world-wide reputation. If they had not been Singer machines, but a spurious article with no part of the Singer invention in them, is it possible to conceive that this Court would have protected the company in such fraudulent use of the name?

Apply the law of this decision to the case at bar. The medicine in question is not patented or protected by any exclusive right. Its name is syrup of figs. Every one has a right to make it and sell it. Having such right to make and sell, he has a right to call it by its name. Indeed, to call it by another name would be a misrepresentation. Therefore, no injunction will lie at the hands of the appellee against the use generally and absolutely of the name as applied to the medicine. The only relief the appellee could, under any circumstance, be entitled to, would be the same kind of relief granted by this Court to the Singer Company, and it would not be entitled to that, if guilty of fraud, which we contend it is.

In *Brown Chemical Co. vs. Meyer*, 139 U. S., 542, it was held that the words "Brown's Iron Bitters" could not be protected as a trade-mark because they were descriptive, but that their use by a person of the same name could be enjoined if he had used them in such way as to deceive the public, and induce purchasers to take his goods as and for those of the plaintiff. No fraud was shown in the use of the words by the plaintiff. If such fraud had been shown—for instance, if his bitters had no iron in them, or only an infinitesimal amount—then he could have gotten no relief of any kind, however fraudulent were the acts of the defendant.

The case of *Prince vs. Prince Metallic Paint Co.*, 135 N. Y., 25, is strongly in point, and *Schmidt vs. Brieg*, 100 Cal., 672, is equally so. In the last case it was held that the defendant could not be enjoined absolutely from using the name "Sarsaparilla and Iron,"

because that name, being descriptive, was not a valid trade-mark ; but that he could be enjoined from using it in such way as to enable him to pass off his goods as and for those of the plaintiff. There was no charge of fraud against the plaintiff.

The rule of law deducible from the cases cited in appellee's brief is apparent. There is nothing new about it, for this Court has applied it frequently. We state it as follows :

No injunction will be granted against the use of a name *simpliciter*, which is not a valid trade-mark ; but an injunction may be granted against its use in such way as to deceive the public and enable the defendant to pass off his goods for those of the plaintiff, provided always, however, that the plaintiff is guilty of no materially false representation in his own use of the name, in which event he is entitled to no relief whatever, however fraudulent may be the conduct of defendant.

We ask for nothing more than an application of this rule to the case at bar. Our position is :

1. The words syrup of figs are not a valid trade-mark, and, consequently, an injunction against their use *simpliciter* cannot be granted.
2. In no event could the appellee be entitled to any further relief than an injunction against the use of said words when made in such a way as to deceive the public and enable the defendant to pass off his goods as and for those of the complainant, but even such limited relief could not be granted if complainant is himself guilty of fraud in the use of the name.
3. The complainant is guilty of fraud in its use of the name, and, therefore, is entitled to no relief of any kind.

All of which is respectfully submitted.

JOHN H. MILLER,
Counsel for Appellant.

No. 192.

Br. of Olney for Respondent

390
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JAMES H. McKENNEY,
Clerk.

Filed Nov. 12, 1900.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

CLINTON E WORDEN & CO.,

APPELLANT AND PETITIONER,

vs.

CALIFORNIA FIG SYRUP CO.,

APPELLEE AND RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

WARREN OLNEY,
Of Counsel for Respondent.

IN THE SUPREME COURT OF THE UNITED STATES.

CLINTON E. WORDEN & CO.,
Petitioner,
vs.
CALIFORNIA FIG SYRUP COMPANY,
Respondent.

Brief for Respondent in Opposition to Granting Writ of Certiorari.

Notice having been given that application will be made to this Court for the issuance of a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit requiring it to certify the record in the cause entitled Clinton E. Worden & Co., Appellant, *vs.* California Fig Syrup Co., Appellee, for review by this Court, the appellee therein, and respondent here, appears and opposes the issuance of the writ. And in support of said opposition presents the following:

The ground upon which the petition for the writ is based is that the decision sought to be reviewed of the Circuit Court of Appeals for the Ninth Circuit is in conflict with prior decisions in the Sixth and First Circuits.

That the claim is not true, in fact, appears from the decision itself. (P. 637 *et seq.* of Transcript of Record, 102 Fed. Rep., 336.)

But to show still more plainly how untenable the claim is, we present a short history of the previous litigation leading up to the present action :

In 1892, the California Fig Syrup Company instituted three suits, one in the Ninth Circuit for the District of California, entitled California Fig Syrup Co. *vs.* Improved Fig Syrup ; the second in the Sixth Circuit, District of Michigan, entitled California Fig Syrup Co. *vs.* Frederick Stearns & Co. ; the third in the First Circuit, District of Massachusetts, entitled California Fig Syrup Co. *vs.* Putnam.

All three actions were based on the theory that complainant had a *trade-mark* in the words "Syrup of Figs" as applied to a liquid laxative medicine, and that the respective defendants were pirating the name.

The California action came on for hearing first, on a motion for a preliminary injunction, before McKenna, Circuit Judge. (51 Fed Rep., 396.)

The learned judge in his oral opinion said it was a case of trade-mark, but placed his decision (see p. 297) not on the ground that complainant had the exclusive right to the use of the name "Syrup of Figs," but that the respondent had by the use of the words, and by other acts so far imitated plaintiff's packages as to represent defendant's goods as the goods of the plaintiff.

The defendant appealed, and the Circuit Court of Appeals, in 54 Fed. Reporter, 175, affirmed the judgment of the lower court.

The Court of Appeals held that the appellee (complainant in the court below) had a trade-mark in the name, "Syrup of Figs" or "Fig Syrup."

But the point really at issue, and the one argued by counsel, was, as to whether the complainant had a standing at all in court, for the reason, as most strenuously claimed, by appellant (defendant in the court below) that it (complainant) did not come into court with clean hands.

That was the question fought over, and decided, in favor of complainant.

After the decisions in the Ninth Circuit, the causes in the other circuits, above referred to, came on for hearing, and in each case the court dismissed the bill on the ground that complainant did not come into court with clean hands. In both cases the fraudulent conduct of the respective defendants was proven, and it was held that, but for the familiar maxim above stated, the complainant would have been entitled to relief. The particular act of turpitude which in the opinion of the court disentitled plaintiff to relief was this: Upon the cartons or boxes in which plaintiff enclosed its bottles, was printed in large capitals the words, "Syrup "of Figs presents in the most elegant form the laxative "and nutritious juice of the figs of California," followed by the words in smaller letters, "combined with the medicinal "virtues of other plants known to be most beneficial to the "human system." As matter of fact there was not enough fig juice in the composition to affect its character. For this reason the courts in the sixth and first circuits dismissed the respective bills.

California Fig Syrup *vs.* Putnam, 68 Fed. Rep., 750. Affirmed in 69 Fed. Rep., 740.

The opinion of the Circuit Court of Appeals in the sixth circuit is by Judge Taft and is quite elaborate.

California Fig Syrup Co. *vs.* Frederick Stearns & Co., 73 Fed. Rep., 812.

The Court held that the words "Syrup of Figs" cannot be appropriated as a trade-mark, but also holds (p. 816) that plaintiff would be entitled to relief on the ground of "*unfair competition*," but for the reason "that the complainant has "built up its business and made it valuable by an *inten-*

" *tional* deceit of the public. It has *intended* the public to " understand that the preparation which it sells has, as an " important medicinal agent in its composition, the juice " of California figs."

We have italicized the words "intentional" and "intended," for here is the point of the conflict between the former decisions above referred to by the Court of Appeals for the Ninth Circuit and the Court of Appeals of the Sixth and First Circuits. One holding there was no *intentional* deceit and the two others that there was. It is true that the courts conflicted on question of trade-mark, but that question has been eliminated in the case now sought to be reviewed. When these decisions were announced they showed a direct conflict between the judgments of two Circuit Courts of Appeal, *and yet this Court on the petition of the California Fig Syrup Co. refused a writ of certiorari to the First Circuit.*

California Fig Syrup Co. *vs.* Putnam 163 U. S. 678.

The ground upon which the motion for a writ was based was that there was a direct conflict between the decisions of the courts in the First and Sixth Circuits on the one hand and the Ninth Circuit on the other.

We come now to the case at bar and its connection with these former cases.

Immediately after the decisions in the First and Sixth Circuits the complainant changed its packages so as to meet the objections made by those courts. It completely eliminated from its wrappers and cartons all objectional matter, and advertised far and wide, in all the newspapers of the country, what the medicinal properties of the compound were, and that figs had nothing to do with it other than to promote a pleasant taste.

On every bottle of its medicine sold since the publication of the decision in the Sixth Circuit there has been printed in

plain capital letters these words: "This excellent remedy "presents in the most acceptable form the medicinally laxa- "tive principles of plants known to act most beneficially, to "cleanse the system effectually, to permanently cure habit- "ual constipation, and the many ills dependent on it, to "dispel colds and headaches, and prevent fevers, to act "gently yet promptly on the kidneys, liver and bowels.

"The juice of the figs in the combination is to promote "the pleasant taste."

On another side of the box are these words: "Its efficacy "and delicacy of flavor are due to the medicinal and agree- "able qualities of plants and aromatic carminatives, skill- "fully combined with pleasant liquids, among which may be "mentioned the juice of figs."

Opinion of Court, p. 640 *et seq.* of Record, also 102 Fed. Rep., p. 338; and Exhibit "A," in Record next preceding the opinion.

After these changes in the cartons or wrappers were made, the appellant, Clinton E. Worden & Co., flooded the markets of the Pacific Coast with a compound which it called "Syrup of Figs," purporting to be put up by different fig syrup companies, and induced retail druggists to buy the same by the plea that its compound was cheaper than the genuine medicine, and could be sold to customers in place of the genuine article.

Thereupon this suit was instituted. It was not, as stated by the petitioner, the contention of complainant in the court below that it has a trade-mark in the words "Syrup of Figs". At no time subsequent to the decision in the Sixth Circuit has complainant claimed a trade-mark in those words. What it claimed in this action, and does now claim, is that the term Syrup of Figs was unknown until complainant used it, and that it has now acquired with the

public and the drug trade a secondary meaning, viz, complainant's preparation when applied to a laxative medicine, and that the defendant is using the name to palm off upon unwary customers its (appellant's) compound as the complainant's medicine. In other words, it is a case of **unfair competition,** pure and simple.

This was the theory of complainant.

See opinion of Judge Morrow, 86 Fed. Rep., at p. 215, where he says:

"The bill of complaint in this case proceeds upon the "theory that the rights of the complainant have been in- "fringed by the defendants by unfair competition. It is "not strictly a charge of an infringement of a trade-mark, "although it has many of the elements of such a case; but "the facts alleged by the complainant plainly set forth for "the purpose of establishing the charge that the defendants "are engaged in an unfair and fraudulent competition "against the business of the complainant, conducted with "the intent on the part of the defendants to avail them- "selves of the reputation of the complainant to palm off "their goods as the goods prepared and put up by the com- "plainant. The main question is therefore one of fact, "since the law upon this subject has been settled by "numerous authorities."

And see decision upon final hearing reported in 95 Fed. Rep., page 132; Record, page 574.

See also opinion of Circuit Court of Appeals, Record, near bottom of page 639.

It also appears from this record (what was never shown before) that when the name "Syrup of Figs" was first applied to the compound it was then in fact a decoction of fig juice and senna. Afterwards when it came to be made in large quantities it was found that the fig juice fermented and cane sugar had to be substituted. In other words a different case was made out on the question of whether or not

there had been any deception of the public from the cases made out in the First and Sixth Circuits.

In the former actions, in the First and Sixth Circuits, no attempt was made by complainant to show how it came to use the name, nor that it had committed no *intentional* fraud.

Special attention was given to that matter in this case, and also in the original one fought out in the Ninth Circuit.

The real point involved in all the actions referred to, was whether the court, upon the facts presented, would listen to the complainant. If complainant is granted a hearing in court, the question of trade-mark cuts no figure, for though it has no trade-mark, it does have the right to relief on the ground of unfair competition.

Grounds for Issuing Writ of Certiorari.

We understand that this Court will not issue a writ to review the decision of a Circuit Court of Appeals unless it appears:

1. That two of the Circuit Courts of Appeals have decided the same question differently, or

2. That a question of real public interest is involved which requires speedy settlement by the highest Court in the land.

That the writ cannot issue upon the first ground is manifest, for there is no conflict. The opinion in the Record, page 540 *et seq.*, shows that fact conclusively. In both cases the question was, Has the complainant a standing in a court of equity? It was a question of fact. And the facts proven were materially different in the two cases. When, in former years, there was a real conflict between the decisions of the Ninth Circuit on the one hand and the First and Sixth Circuits on the other as to the rights of complainant (one holding that complainant had a trade-mark, the others that

it did not, and that it could not have relief on the ground of unfair competition because of its own turpitude), this Court refused the request of complainant to issue a writ to the First Circuit.

Does not a homely and very common proverb now apply, when application is made for the writ, as against the complainant?

The second ground, viz. that the public interests require this Court to determine whether the applicant for the writ is at liberty to steal the business of appellee and sell its goods as appellee's goods, is one that does not require discussion.

We ask that the writ be denied.

Since the foregoing was put in type appellant has served a brief in support of the application for a writ.

The basis of the argument, as we understand it, is that the Court of Appeals, Ninth Circuit, was mistaken in supposing that the case before it was different from the cases before the First and Sixth Circuits. But it is quite common for the unsuccessful litigant to firmly believe that the decision is directly in conflict with one to which he has called attention. There is just as good reason in three-fourths of the litigation in Federal courts for this Court to listen to complaints that the Circuit Courts of Appeals have not given proper heed to the authorities cited, as to listen to the plaint of the losing party here.

WARREN OLNEY,

Of Counsel for California Fig Syrup Co.

No. 1492. 36
Brf. of Olney v Carlisle

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Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed March 3, 1902.

CLINTON E. WORDEN & CO.,
Petitioner,

vs.

CALIFORNIA FIG SYRUP CO.,
Respondent.

ON CERTIORARI TO CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

BRIEF FOR RESPONDENT.

WARREN OLNEY,
For Respondent.

J. G. CARLISLE,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, New York.

IN THE

Supreme Court of the United States.

CLINTON E. WORDEN & CO.,
Petitioner,

vs.

CALIFORNIA FIG SYRUP CO.,
Respondent.

BRIEF FOR RESPONDENT.

The question in this action is the application of the law relating to

UNFAIR COMPETITION.

Complainant in the Circuit Court, Appellee in the Circuit Court of Appeals and Respondent here, did not and does not claim that the name "Syrup of Figs" constitutes a trade-mark, but a trade name. The name is descriptive of the article originally put on the market, and, therefore, under many of the authorities, could not be treated as a trade-mark. Before, however, closing

this brief we shall show that under some of the latest authorities a descriptive name, when it has acquired a secondary meaning to the trade and with the public, may become and sometimes does come to be a trade-mark, in the full legal sense of the word.

But, for the purposes of our contention, it is not necessary to go further than to show the judgment of the court below was right upon the doctrine of UNFAIR COMPETITION.

That the name, "Syrup of Figs," was originally descriptive of the complainant's medicine is admitted by the appellant. (See pp. 10, 11, 12 of appellant's brief.) The record, as we shall presently show, proves, that, as originally compounded and put upon the market, the medicine was a true Syrup of Figs, that is, compounded principally of fig juice and senna, senna being the active medicinal agent.

The case at bar is entirely different from the cases cited by counsel for appellant from the Second and Sixth Circuits in two particulars, each so important, that it puts an entirely different phase upon the complainant's case.

They are:—

1. It was proven here that the name was a true and honest name when applied to the medicine.

There was no attempt to prove this fact in those cases.

2. The wording on the cartons and labels criticised in those cases was entirely eliminated long before petitioner flooded the market of the Pacific coast with its counterfeits.

The contention of the imitators in the Second and Sixth

circuits was that the complainant did not come into court with clean hands.

Upon that proposition we are not called upon in this case, to say that, upon the record presented to those courts, the decisions were either right or wrong.

The fraud committed upon the complainant and upon the public by Clinton E. Worden & Co., defendant in the court below, petitioner here, is admitted. But it is said: complainant is not entitled to any relief because it does not come into court with clean hands. This matter was fully presented on affidavits, on motion for injunction, and the court held, 86 Fed. Rep., 212, that complainant was not guilty of fraud and was entitled to relief. The case was then tried on its merits, the substantive defense still being the same. The decision of the court was again in favor of complainant, 95 Fed. Rep., 132. The defendant then appealed to the Circuit Court of Appeals, Ninth Circuit.

The opinion affirming the judgment is found in 102 Fed. Rep., 334.

The special attention of this court is called to the opinions of the courts below, especially to the first, in 86 Fed. Rep., p. 212, and the last, in 102 Fed. Rep., p. 334. In both decisions the courts based their rulings on the fact that complainant had eliminated the matters from its cartons objected to in the Second and Sixth Circuits. The courts, however, did not refer to the fact that the name was an honest one, upon the new evidence produced in this case.

For a complete understanding of our contention that plaintiff has a standing in court, and that the familiar

maxim of equity jurisprudence, upon which the petitioner relies, does not apply, it is necessary to state, from the record,

THE HISTORY OF THE CASE.

Confection of Senna has been a well-known laxative preparation for at least seventy years. Record, pp. 272, 273, 276, 277, 278, 281, 282 and 467.

This Confection of Senna was made by mixing senna with figs. Record, pp. 467, 272, 273, 277, and with other substances, but figs and senna seem to have been the principal ingredients.

There was also a Syrup of Senna (p. 272). The formula for Syrup of Senna is given in U. S. Pharmacopia. Thus it appears that Confection of Senna and Syrup of Senna are well-known preparations, officinally recognized by the medical profession and pharmacists. The Confection of Senna is a sort of paste.

In 1878–9 Richard E. Queen, an educated young pharmacist, was proprietor of a drug store in Reno, State of Nevada, and had given special attention to making original compounds of foods and medicines (p. 50).

It occurred to him that a liquid cathartic would sell better on the market than the prevailing kinds, and he made many experiments for the purpose of obtaining such a laxative (p. 51). He considered senna the best known base for a cathartic, but it must be so treated as to overcome the bitter taste and eliminate its griping effect, in order to make it popular. He succeeded in making a liquid preparation, which was in effect the same thing as the well-known Confection of Senna, and being composed principally of figs and senna, but over-

coming the bitter taste, and eliminating the griping quality. This preparation was a most excellent one, and was named by Mr. Queen "Syrup of Figs."

William Pinninger, an educated English pharmacist, was in partnership with Mr. Queen at the time the latter began to put his medicine on the market, and for a time (beginning in April or May, 1879, down to the end of 1880) did the manufacturing, pp. 446, 447. During this period that he manufactured the medicine he testified that figs were uniformly used, but the proportions used he had forgotten. But he says, on p. 467, on cross-examination, in speaking of the medicine:

"It was really a modification of the pharmaceutical "process in making Confection of Senna, which has a "world-wide reputation. All pharmacists know how "it is prepared. And this was just simply a modifica-"tion of that same thing as to the treatment of the "prunes, figs and tamarinds used in that compound."

The Complainant produced at the trial the grocer from whom Mr. Queen purchased the figs in what he considered large quantities. "I asked what they done with so many figs" p. 453, and was told they were used in the manufacture of "the medicine called the 'Syrup of "Figs.' "This conversation was with Mr. Queen. He "moved up just a few doors from me after the fire and "he used to come down there and buy these figs, and I "wanted to know what he done with so many of them, "and he told me that he was manufacturing this medi-"cine" (pp. 453-4).

If, what seemed to the witness large quantities of the fruit, seems to the court small (viz. "a dollar's worth or more at a time") it must be borne in mind, first, that

figs are very cheap on the Pacific Coast, and second, that this was in the early days of this medicine, and while the manufacture was on a very small scale.

The counsel for Clinton E. Worden & Co. admitted in the Circuit Court of Appeals the use of large quantities of figs by Mr. Queen, at first in the manufacture of his medicine, for he said, p. 32 of his brief in that court, "It would appear, however, that in 1878, Mr. Queen "was not fully convinced of this fact [that figs are not "really laxative] and was apparently of the opinion "that fig-juice, when used in substantial quantities in "his medicine, would add to its laxative properties, for "he began by using large quantities of fig-juice. The "soluable substance of the fig was dissolved in hot "water and put into the medicine in the shape of "fig-juice, the seeds and skin not being used at all "(Record 90). His first idea was to use large quanti-"ties, but he found that it was deleterious to the com-"pound, destroying its stability and causing it to "ferment. Therefore, he ceased using large quantities "of fig-juice and reduced it to the present small amount "(Record pp. 92, 93)." In the brief filed in this court the same admission is made at pp. 10, 11 and 12.

There is here an unequivocal admission of a fact that takes from Mr. Queen all appearance of perpetrating a fraud in giving his medicine the name "Syrup of Figs."

Having produced his compound, composed largely of senna and figs, that was in the main satisfactory, the question of a name to be given it came up.

His medicine was more in the nature of syrup of senna than anything else, just as the paste so well known to druggists was a confection of senna and so called. But

he could not use the name "Syrup of Senna" for that was a well known preparation, prepared in a particular way, with ingredients and their proportions prescribed. See U. S. Pharmacopia, title "Syrup of Senna," and Record p. 272.

Among pharmacists and physicians a formula set out in the U. S. Pharmacopia, to which a name has been given, becomes official, and a recognized article. The name means to the physician or druggist the precise article mentioned and described in the recognized official list of remedies.

While Mr. Queen's medicine was in the nature of "Syrup of Senna," yet it was not "Syrup of Senna" and was not made in accordance with the official formula of "Syrup of Senna." To have called his medicine "Syrup of Senna" would have been giving it a false name. It would have been stating to druggists and to the medical profession a falsehood.

We shall presently show that he made his medicine popular by getting the endorsement and recommendation of the medical profession and of druggists. It was solely through them that he placed the medicine originally upon the market.

If he had called his medicine "Syrup of Senna" physicians would have refused it recognition. He called it "Syrup of Figs," and the record shows that the medical profession have endorsed the remedy and have not objected to the name.

As he had freely used figs in the composition of his medicine, it was the most natural thing in the world for him to name it what he did. He used, for the

first time in the world, a syrup made from figs. He combined it with a medicinal agent and made it valuable. "There is no such preparation in pharmacy known as "Syrup of Figs" (p. 202).

Any one can make a real syrup of figs, but when made it is valueless. Any one can make a syrup of corn, but used alone it can have no virtue, except as food. The name of "Syrup of Figs" was unknown to the medical fraternity, to druggists and the world at large. Mr. Queen was absolutely and undoubtedly the first user of the name. This was proved beyond contradiction. It was also proved that while the term is descriptive of what any one can make with figs, hot water and sugar, yet it has come to have a secondary meaning. It means to physicians, druggists and the public at large, Mr. Queen's composition and nothing else.

Returning to the circumstances surrounding this naming of the child of his invention, is there anything fraudulent in his calling it "Syrup of Figs?" It was a true syrup of figs combined with senna and other plants. There is no doubt he intended, as claimed by counsel for defendant in the court below, to make the name descriptive.

But that is not a fraud. He intended to make the name attract the attention of the public, as something new and original.

But that was no fraud. It is only what men have done from time immemorial, and no censor of morals has yet had the hardihood to declare it a crime.

Mr. Queen called his new medicine "Syrup of Figs" as he had a perfect right to do. Presently we shall call

attention to the fact that the medical profession has never found fault with the name, but has endorsed the medicine beyond anything ever known in the history of proprietary remedies. They prescribe it by that name.

The learned counsel for Clinton E. Worden & Co. has stated the result of the testimony correctly in the extract already quoted, when he says: "His (Queen's) first idea was to use large quantities of this fig-juice, and he did use large quantities, but that he found it was deleterious to the compound, destroying its stability and causing it to ferment. Therefore, he ceased using large quantities of fig-juice and reduced it to the present small amount."

See also Record p. 93.

But this reduction was after the name had been given in good faith, and after the demand for it required the manufacture in large quantities.

If the medicine could always be shortly used after its manufacture, it might be made as in the original formula, but experience in the manufacture of large quantities, to be kept for a long time, and for export, has shown that too much of the fig-juice endangers the proper preservation of the medicine and its uniform action.

Mr. Queen testified that he continued to make changes and improvements in the medicine down to 1885–1886 (p. 81).

Since that time the complainant company uses the soluable parts of ten pounds of figs to one hundred gallons of the medicine, or a little less than one per cent. (pp. 55, 91, 97, 250). There is no justification in the

record for counsel's contention that the amount of fig juice is less than one-tenth of one per cent. (see p. 58 *et seq.* of Appellant's Brief).

No doubt the average man is unable to detect, from such a small percentage, the taste of fig in the medicine. But Dr. Winslow Anderson (see p. 172), a graduate of the University of California and of the Royal College of London, and Dean of the San Francisco College of Physicians, was able to detect it distinctly by the taste (see p. 479).

This gentleman gave quite an exhibition of his ability to analyze medicines by the taste (pp. 477–480).

But that it has a positive beneficial effect in the production of the agreeable taste of the medicine cannot be doubted. The composition is noted for its pleasant taste. It is one reason why it is so popular.

The ingredients in its composition have been selected and proportioned by an artist in his business, and when he declares that the fig juice does tend to produce the result he has labored for, and attained, he is entitled to full credit (pp. 102, 103).

Introduction of the Medicine to the Public.

Mr. Queen having, as he believed, made a really beneficial medicine out of senna and fig juice, together with carminatives, took a method of introducing it to the public quite different from the ordinary methods of men pushing patent medicines. His method was to visit physicians, tell them the ingredients and get them to try it. They did try it, with the result that they recommended it to their patients (pp. 52, 53).

After the reputation of his medicine had spread from Reno to the neighboring towns in Nevada and California, he came to San Francisco, having first incorporated the Plaintiff Company. This was in 1883. In 1885 he went to Louisville, Ky., and established a branch office, but the business was still very small, "and in the year " 1887 we commenced to place advertisements in medical " journals stating, for the information of physicians, the " composition and active ingredients of the preparation, " and, in that same year I commenced, acting as Manager " of Complainant, to have the representatives of the " California Fig Syrup Company visit physicians at med- " ical conventions, and in their offices, with instructions " to give samples of the remedy to physicians, to request " them to try it in their practice, and to state to them " the active ingredients of the preparation, that a small " quantity of figs were used simply to promote a pleasant " taste, and to give them such other information as they " might desire in regard to the manufacture and sale of " the article. . . . We did make a special effort [to " attract the notice and recommendation of physicians] be- " lieving that it would be greatly to our advantage to se- " cure the approval and recommendation of physicians. " We have continuously, down to the present time, adver- " tised the facts in leading medical journals very exten- " sively and continuously, and spent many thousands of " dollars to inform physicians that the active principals, " the active laxative parts of the preparation, are obtained " from senna, combined with aromatic carminatives, and " that other substances are used, such as sugar, water " and a small quantity of fig-juice. It resulted in a

" very large recognition and acceptance on the part of " the medical profession, of Complainant's preparation, " and in the recommending and prescribing the same " and a large increase in our sales" (pp. 55, 56).

There is no profession or calling so rigorous in the application of ethical rules to the practice of their profession, as that of physicians. Some of these rules seem to us artificial, and not based upon a wide or general apprehension of the world, or of men, but the strict adherence to them of what are called the regular part of the profession is well-known. One of these rules is not to patronize patent medicines or quack nostrums of any kind. They go so far, that medical journals, in good standing, will not receive or publish advertisements of medicines except in a few cases that have been passed upon by a board of physicians, and the medicine pronounced to be an " ethical remedy."

How do they treat the remedy known as Syrup of Figs?

Dr. Joseph M. Matthews, of Louisville, Kentucky, is, or was, the President of the American Medical Association, the great national organization of what are called the "regular" physicians (p. 156.) He published, some years ago, a book on diseases of the rectum (p. 61) pronounced by competent physicians "the best-known book on the subject" of which it treats (pp. 173, 158). In this book, at p. 279, he recommends the use of "Syrup of Figs" in certain cases, saying among other things, "Children especially can take this medicine easily. Its " purgative action is obtained from the use of senna" (p. 61).

Compare the medicine specially recommended for children by the President of the American Medical Association, with the imitation placed on the market by Clinton E. Worden & Co., with its twenty-five to thirty-two per cent. of alcohol and a quantity of henbane. See Petitioner's Exhibit 6, opposite p. 624, and p. 472.

The "Journal of the American Medical Association" is the national official organ of the Physicians of America in regular standing, p. 157. Before advertisements are admitted to the columns of this journal, they must be passed upon by "a council composed of prominent members" of the Association, and when an advertisement of a remedy is admitted by this board, it is considered an "ethical remedy," pp. 488, 484. This journal has from the start published the advertisement of the medicine of Complainant, respondent here.

Again, some of the best known and most reputable physicians were willing to go on the stand and testify to the excellence of the medicine known as Fig Syrup; that they used it themselves in their own families and prescribed it for patients. They were Dr. Winslow Anderson, Dean of the College of Physicians and Editor of Pacific Medical Journal; Dr. Gerald Fitzgibbon, a member of the San Francisco Board of Health; Dr. A. P. Woodward, President of the San Francisco Medical Society; Dr. D. A. Hodgehead, Professor of Obstetrics and Diseases of Children in the College of Physicians, and Dr. W. F. McNutt, than whom there is no better known physician, or who stands higher in his profession on the Pacific Slope. All these physicians recommended in high terms this remedy with which they had been acquainted for years.

It has never occurred to them that calling this medicine "Syrup of Figs" was a fraud upon the public. The testimony of Mr. Henry Michaels, a leading wholesale druggist of California, shows how the drug trade regard the complainant's medicine and also how they regard the use of the term "Syrup of Figs." His testimony begins at p. 205. At bottom of p. 215 is the following question:

"If you were to hear the word 'Syrup' applied to a "new vegetable or fruit, to which it had never been "applied before, what would that indicate?

A. "Well, in medicine, I would take it to indicate a "compound. It is common practice in putting up pro- "prietary medicines to invent or take names, catchy "phrases, as we call them. They use this in that way. "Some of them coin words altogether."

Q. "Is it common practice to employ a phrase as "indicating a compound which incorrectly described the "contents of the compound?"

A. "Well, it does not imply that exactly, but it does "not convey, to the dealer's mind at least, the idea that "that compound is solely composed of that article. "Now, you take sarsaparilla. That is one of the com- "monest articles named in the drug trade, but that is "only an agent. It is the most unimportant part of the "whole compound."

It should be borne in mind that Mr. Queen is a druggist, and before adjudging him guilty of fraud and refusing him redress for a most grievous wrong, it would be well to place one's self in a position to look at the case from his point of view. Neither doctors nor druggists have ever thought him in the wrong in his method

of advertising his medicine. They have always been unconscious of any sin having been committed by the complainant or Mr. Queen.

No doubt lawyers and judges know more, especially of ethics, than any other class in the community, but we think the suggestion not out of place that, in a matter in which the medical profession are especially interested, and involving a question of ethics in the matter of advertising and prescribing a medicine, that the profession and the medicine are both entitled the benefit of a reasonable doubt before convicting the medicine of having a fraudulent name, or the profession of willfully patronizing or recommending a fraud. They should not be condemned unless clearly guilty. The court would not adjudge that a matter peculiarly within the province of the clergy was a fraud, when the clergy did not think so, unless the case was beyond all doubt. The court would certainly hesitate to declare a clergyman's act fraudulent, if his conduct was common to all his brethren. We do not claim that, in a clear case, the court should refuse to condemn where the ethical standards of another profession are involved, but what we claim is, that a reasonable regard for the fallibility of human judgments should make the court very slow to condemn, in the medical profession, a line of action that seems to that profession unobjectional. It must not be overlooked that the approval of the medicine by physicians was obtained while the medicine was enclosed in the cartons to which the Courts in Second and Sixth Circuits objected.

Having shown how and why the medicine was named "Syrup of Figs," and that it met with great favor from physicians and the public, we proceed in our history to the commission of the only act by complainant that has ever been criticised, save and except the criticism on the name.

Before going further, however, we desire to say that none of the material facts hereinbefore set out relating to the naming of the article were ever before presented to any court that rendered an adverse decision to complainant. This we shall enlarge upon when we come to speak of the adverse decisions rendered by certain courts condemning the actions of this repondent and refusing it relief.

After the medicine was named, and down to the year 1889, no reference was made on the carton enclosing the bottle, nor on the label on the bottle itself, to figs (see p. 83, *et seq.*). The carton in which the bottle was enclosed was in all other respects substantially similar to the one that has been in use since July, 1896, and which is found opposite page 634 of the record, where it is marked "Complainant's Exhibit A." By looking at this exhibit it will be seen that the carton has on it these words near the bottom: "The juice of the figs in the "combination is to promote the pleasant taste."

With the exception of these words and the words on the side making substantially a similar reference to juice of figs, the carton in use at the time this suit was brought and since July, 1896, was the carton in use up to May, 1889 (pp. 83, 84, 85). Counsel for respondent say (pp. 35, 45, 46 of brief) that the original label was the

same as that in use at the time of the adverse decision in the Eastern Courts. The same statement was made in the court below in briefs and their attention called to its incorrectness.

In May, 1889, complainant inserted in the label placed on the bottle the words "California Liquid Fruit Remedy," but removed them in May, 1894, just three years before Clinton E. Worden & Co. put their immitation on the market. Counsel for petitioner (p. 54) say that this label is not in controversy in this action. Upon that proposition we are agreed.

The outside wrapper or carton down to May, 1889, had nothing on it relating to figs. But in that year a change was made, and on the carton or outside wrapper appear these words in large capitals: "Syrup of Figs " presents in the most elegant form the laxative and " nutritious juice of the figs of California combined with " the medical virtues of plants known to be most bene- " ficial to the human system, forming an agreeable and " pleasant laxative," etc., pp. 84, 85.

This wrapper was discarded in July, 1896, one year before this action was brought.

And, therefore, like the label on the bottle, *is not now the carton in controversy?*

A *fac simile* of this old wrapper or carton is set out opposite p. 634 and marked there "Complainant's Exhibit B." That is a mistake. This wrapper was not offered in evidence by the complainant. Complainant's exibit "B" is the bottle itself, see p. 18, but is not copied into the record, for the reason that, by order of the Court, the original was sent to the Circuit Court of

Appeals, see pp. 592, 593. This old wrapper, found opposite p. 634, is petitioner's exhibit 16. See p. 503.

Petitioner's Exhibit 16, marked by mistake Complainant's Exhibit "B" and opposite p. 634, is the carton the Complainant used from May, 1889, to July, 1896. It is the whole head and front of Complainant's offending. It hath this extent, no more, that Complainant, during these years placed on its carton these words: "Syrup of "Figs presents in the most acceptable form the laxative "and nutritious juice of the figs of California, combined "with the medicinal virtues of plants known to be bene-"ficial," etc.

As the medicine was originally prepared, the statement was exactly true. Upon the record as made in this case, there could not be a fairer statement of the ingredients of the medicine while it was being manufactured and sold in small quantities.

But does it state a falsehood about the medicine that was afterwards manufactured and sold in large quantities, but had as one of its ingredients, however small, the laxative and nutritious juice of the fig, combined with the medicinal virtues of other plants? It certainly does not.

There is no claim made that the medicinal qualities of the preparation comes from figs. That quality is expressly stated to come from other plants.

We come now to the decisions rendered in the Second and Sixth Circuits.

The preparation had become immensely popular, for when the medical profession turned to it as a gentle laxative, of course, with proper advertising, the public

would do likewise. Hence unscrupulous druggists put on the market imitations, and, when sued, defended on the ground that the complainant's name and cartons were fraudulent. It has always been known, for complainant had taken great pains that druggists and medical men should know, that the medicinal virtues of the preparation came from senna. Hence the pirates had a plausible defense to their hand.

Now, here was where complainant made a mistake. Acting under advice of able counsel, it claimed the name "Syrup of Figs" to be a technical *trade-mark*, when all that it was necessary to claim was that it constituted a *trade-name*. But it is not the first time, nor will it be the last, that client and distinguished counsel have made, and will make, what appears to others, a great mistake in what is called the "Theory" of a case.

Able counsel in the Second and Sixth Circuits pressed injunction suits against infringers on the theory that complainant had a trade-mark in the name, and that the statement on the cartons and bottles was immaterial.

He did not address himself to showing that the name "Syrup of Figs" came to be honestly and properly applied to the product as largely descriptive of the ingredients of the medicine. He was so afraid of ruining his case as a case of trade-mark, by showing that it was descriptive, that he did not prove what was proved in the case now at bar, viz.: That figs were at the time the name was given an important part of the composition.

That the name was descriptive, was the rock over which he and his client stumbled.

The result was that upon the case, as presented in the Second and Sixth Circuits, the courts denied complainant any relief. We are not prepared to say that upon the cases, as presented, those courts were wrong.

In California, the complainant did not claim in the suits it brought, that Syrup of Figs was a trade-mark, but did claim unfair competition.

Its counsel addressed himself specially to showing that the complainant's hands were not foul. The first case there came up upon motion for injunction before a distinguished member of this court, and was quickly disposed of upon the showing made by affidavits. The defendant took an appeal from the order granting an injunction, and in the Appellate Court the same effort was made, and successfully made, to show that plaintiff had a standing in court. In the decision rendered by the Circuit Court of Appeals (54 Fed. Rep., 175), the court went even further than counsel had contended for, and held there was a technical trade-mark.

There is no necessity for us to contend, that in so holding the Court was right. But we do contend that it was right, clearly and unmistakably right, in refusing to throw the complainant out of Court and enjoining the use of the name. Those were the questions to which counsel on both sides addressed themselves. They were the questions they pressed *pro* and *con* with their utmost strength before the Judge of the Court below on motion for an injunction.

This Court has now the facts, and presently we shall

cite the decisions that justified the Courts in the Ninth Circuit in refusing to turn the complainant out by the shoulders, when a most grievous wrong was being perpetrated upon it. These decisions will show that though complainant did at that time use on its carton the phrase that "Syrup of Figs presents in the most "acceptable form the laxative and nutritious juice of the "figs of California, combined with the medicinal virtue "of plants," and did use on the inside label the phrase "California Liquid Fruit Remedy," yet complainant is not beyond the protection of the law, and may not be robbed with impunity.

But before citing these authorities we desire to call attention to the petitioner here (one of the defendants in the Court below).

Clinton E. Worden testifies that before starting in business on his own account (page 400 et seq.) he was in the employ of Frederick Stearns & Co. in California as the agent of that corporation. The business of Frederick Stearns & Co. appeared from the testimony of Henry Michaels (pages 216–217) to be that of manufacturing what is called "non-secret" medicines. The witness says (top of page 217): "Non-secret medicines are under-"stood by the trade to be such articles as will come pretty "near in appearance and quality to well-known patent "medicines for the purpose of selling in their place."

"Q. Practically, then, what is known in the trade as "a manufacturer of non-secret medicines is one who "manufactures articles as nearly like the proprietary or "patent medicines as possible in order to take the place "of these medicines in the trade?

" A. Yes.

" Q. That is the understanding in the trade?

" A. That is the understanding, yes."

(See also the statement of facts in opinion of the Circuit Court of Appeals in the *Stearns case*, 73 Fed., at p. 814). It will thus be seen that the business training of Clinton E. Worden fitted him for the work he admits to have done in California. He started a manufactory of medicines in California forming the defendant corporation. The complainant on the trial put two of the defendants upon the stand as witnesses, viz.: J. A. Bright and Truman F. Bacon. Mr. Bright's testimony commences at page 513, and we respectfully ask the Court to read the testimony of this witness through, and likewise the testimony of Mr. Bacon, which commences at page 537. The witness Bright testified (page 516) that the defendant Clinton E. Warden & Co. through its agent had been in the habit of coming to him soliciting him to purchase "non-secrets," and among others solicited him to purchase "Syrup of Figs." Mr. Worden himself testifies (page 402) in answer to the questions asked by his counsel as follows:—

" Q. When did you commence to manufacture an " article called Syrup of Figs?

" A. And put it on the market as Syrup of Figs?

" Q. Yes.

" A. After the suit of the *California Fig Syrup Co.* " v. *Frederick Stearns & Co.* had been decided by the U. S. Circuit Court of Appeals."

Before beginning the manufacture of his compound he had complainant's medicine analyzed to see if he could

find out what it was made of (pp. 330, 331). How suggestive this is of the intent he had in view!

Mr. Worden testified at another place that he learned of this decision in May, 1896. He did not put his medicine upon the market until about the first of May, 1897. If he had done so the complainant would have known it at once. It was not until the 7th of May, 1897 (page 69) that his medicine was found on the market. This suit was brought on the first of June, 1897. *The bill of complaint alleges* (p. 23) *and the answer admits* (pp. 39–40) that the defendant Clinton E. Worden & Co. puts up a preparation in bottles and packages marked with the words "Syrup of Figs," "and has stated and declared on "the outside carton or paper box containing said bottles "words importing the meaning and statement that the "same is prepared and sold by a Fig Syrup Company. "On some bottles the statement is made by the said de- "fendant to the effect that said preparation is made by "the 'San Diego Fig Syrup Co., San Francisco, Cal.;' on "other bottles the statement is made to the effect that said "preparation or compound is made by the 'Fig Syrup "Company, San Francisco, Cal.;' on other bottles the "statement is made that said preparation is manufactured "by the 'San Francisco Fig Syrup Co., San Francisco, "Cal.' On other bottles the statement is made to the "effect that the compound is prepared by the 'New "York Fig Syrup Co., New York City, N. Y.;' and "again on other bottles the statement is made that it "is prepared by 'Yetiva Drug Co., Louisville, Ken- "tucky;' and again on other bottles said defendant "makes the statement that the preparation is manu-

" factured by the 'Laxative Fig Syrup Company, New " York City, N. Y.'" These are all fictitious names.

Of course there could be only one purpose on the part of the petitioner here in placing such statements upon the cartons enclosing its compound, and that was to deceive unwary customers into supposing that they are purchasing the genuine article made by the complainant.

Copies of Exhibits "D," "I" and "U," are on the sheet opposite p. 634, but for some reason unknown to respondent here Exhibits "E," "F," "G" and "H," have not been supplied to this Court. But see p. 593, showing they properly belong to the Record. They only intensify the fraud shown in the exhibits copied at p. 634.

Those given in printed record show how the defendant, Clinton E. Worden & Co., has simulated the package of complainant, taken the name "Syrup of Figs," and declared on the packages that the medicine is manufactured by a Fig Syrup Company.

Now, if the Court will turn to the testimony of Mr. Bright and Mr. Bacon, hereinbefore referred to, it will learn, from the positive testimony of the witnesses, the purposes for which these names were placed on the packages and how they came to be placed there. The Court will learn that Clinton E. Worden & Co. sent solicitors around to druggists telling them that since the decision of the Stearns case they could safely sell an imitative medicine under the name "Syrup of Figs," and offering to print on the package statements showing that the medicine was manufactured by a Fig Syrup Company.

The Court will see that upon these statements these

two defendants were induced to purchase from Clinton E. Worden & Co. The testimony of these two witnesses is rather entertaining as well as instructive. For example, the testimony of Mr. Bacon shows how he came, at the solicitation of Clinton E. Worden & Co., to purchase some of the imitative preparation, and how the name "New York Fig Syrup Company" came to be upon the medicine that he was offering for sale in his drug store, and then, on the cross-examination, at page 544, he states that he put the defendant's imitation on his counters and sold some of it, in answer to calls, for Syrup of Figs.

"Q. 42. How did people call for it?

"A. Syrup of Figs, and I would sell that whenever " I could."

On re-direct examination (548), he says that when the term "Syrup of Figs" or "Fig Syrup" is used in the trade it is understood to refer to the complainant's preparation, that if an order is made for "Syrup of Figs" or "Fig Syrup," plaintiff's medicine is meant; that the reputation of this medicine is good.

"Q. 6. Therefore, if a medicine bears the name " 'Syrup of Figs,' it is more likely to sell, is it not, just " for that reason?

" A. Certainly; the advertising of it has created a " demand for it.

" Q. 7. And if any other medicine is sold under the " name, the purchaser, the people who want laxative " medicines, would be induced to buy just because of the " good reputation of the complainant's medicine?

" A. Yes, sir.

"Q. 10. Now, when customers call for 'Syrup of "Figs,' if you gave them the medicine that you bought "from Mr. Worden they would take it, would they?

"A. They would."

Upon the foregoing state of facts ought the plaintiff to be turned out of Court?

It would be most unjust to do so. It was that carton and label, first used in 1889, and thrown out in 1896, that afforded any ground for criticising complainant. It has been shown in this case that the name itself was proper and justifiable. That carton and label were not untrue, but upon the facts as shown in the Sixth and Second circuits, they appeared to be untrue. Complainant immediately told all the world (see Exhibits C, C1 and C2) as it had previously told physicians and druggists the facts as they are. The public has not been defrauded by complainant. It is the petitioner here, and dishonest druggists who are attempting to defraud the public. They ask this court to assist in the fraud. For if the judgment of the court below is reversed, every dishonest druggist will immediately put up a medicine and call it Syrup of Figs, selling it at a small price. Honest druggists will in self defense do the same thing or else lose trade.

It has been found by actual experience that if one druggist in a town puts out an immitation the most of the others follow suit, and when remonstrated with justify their conduct by the plea of self defense.

If the judgment is affirmed no harm will come to any

human being. If it is reversed, the markets will be flooded with all kinds of nostrums under the name of Syrup of Figs, complainant will be ruined and the public will be injured.

There ought to be another maxim of the law to the effect that a party appealing from a judgment rendered against him shall be turned out of the Appellate Court when the only effect of reversing the judgment will be to enable him to commit a fraud.

There has been so much pirating of trade-marks and trade-names that hardly a volume of the Federal Reporter comes out, in these days, without containing the reports of cases of attempted stealing of business by unscrupulous parties. One of the favorite defenses is that plaintiff is himself guilty of some breach of ethics in advertising his business.

We do not question the maxim that a plaintiff must come into a court of equity with clean hands, but of late so many parties, trying to steal the business of others, have invoked this maxim, that there is danger of its becoming a defense for fraud.

An examination of the recent cases shows that courts are waking up to this defense of piracy and are beating it.

The rule now seems to be as follows:

WHERE A MAN HAS AN ESTABLISHED BUSINESS WHICH HE IS SEEKING TO PROTECT FROM UNFAIR COMPETITION, HE WILL BE GIVEN RELIEF IF HE CAN MAKE ANY REASONABLE EXPLANATION OF STATEMENTS CLAIMED TO BE FALSE.

In other words, the Complainant is entitled to the benefit of every reasonable doubt. He shall not be con-

victed of fraud at the solicitation of one trying to rob him, unless the case against him is clear.

Applying such a rule to the respondent here, and where is the case against it!

Let us examine the late cases to see if the rule is not as stated.

Cochrane v. *Macnish*, 1896 App. Cases, 225:

Plaintiff was a manufacturer and seller of mineral and aerated waters. He registered, in England, a trade-mark for soda water, having the words "Club Soda" as its prominent and distinguishing feature. The plaintiff's soda water came to have a large sale under this name, so that the term "Club Soda" came to mean the plaintiff's water, and nothing else. The plaintiff shipped large quantities to Jamaica. The defendants began to sell soda water there as "Club Soda," and the plaintiff brought this action to enjoin them. The defendants set up that their article was so packed that no confusion of their article with the plaintiff's could occur, and also that the plaintiff was not entitled to relief by reason of false and misleading statements in his trade-mark. The trade-mark had on the margin the words "Manufactured in Ireland by H. M. Royal Letters Patent." There was no patent covering the manufacture, and this statement was claimed to be false and misleading. In the trial Court the Judge held that the first defense was made out. In the Supreme Court of Jamaica the majority of the Court held that the first defense was not made out, but that the plaintiff was not entitled to relief because of the statement mentioned on the label. On appeal to the Privy Council this was reversed. The Court held that the

defendant was not entitled to use the words "Club Soda." The question was whether the plaintiff had disentitled himself to relief. The question turns on the meaning of the words on the label. The lower Court found that they meant that the article was protected by an existing patent, and this was strongly urged by respondent's counsel. Plaintiff's explanation was that, with some unimportant exceptions, he used patented machinery in manufacturing the soda. "Considering that it is common ground, that in the manufacture of soda water there is no secret, and frequently no soda, and that all that is required is care and cleanliness; that does not seem an unreasonable or unnatural explanation. There is no suggestion to be found in the evidence tending to throw doubt on that explanation or to show that anybody has been or could be misled by words on which so much labor and attention has been spent in argument and to which apparently little or no importance is attached elsewhere. The appellant's trade is an honest trade and their lordships are not prepared to hold that, by reason of such words not designed to mislead and at most equivocal, the appellant has been guilty of a misrepresentation which disentitles him to relief."

Insurance Oil Co. v. *Scott*, 33 La. Ann., 946:

The plaintiff was selling an oil, calling it "Insurance Oil," and brought suit to enjoin the defendant from doing the same thing. Plaintiff's trade-mark had on it the word "patented." The plaintiff's oil had not been patented but his trade-mark had been registered in the Patent Office. Upon the falsity of the statement in the

word "patented" the defendant relied as disentitling the plaintiff to relief. The Court lays down the proposition very emphatically that in order that the plaintiff be so disentitled it must appear that the label was used for the purpose of deceiving the public, and that if a fraudulent intention does not exist and the use of the word may be explained in *any reasonable sense* consistent with truth and honesty, the party will not be prejudiced. This would seem the true statement of the rule applicable to all of these cases.

Siegert v. *Findlater*, 7 Chanc. Div. 801.

Suit by the proprietors of bitters known as "Angostura Bitters," to enjoin an imitation of their bottles and labels. The heading of the label read "Aromatic Bitters, or Angostura Bitters, prepared by Dr. Siegert at Angostura, now Port of Spain, Trinidad." At the time this label was used, however, Dr. Siegert had been dead for some years and he had in fact never lived at the Port of Spain. Furthermore, the label stated that it bore the complainant's signature, when in fact the signature was that of Dr. Siegert. Upon these facts, the defendant claimed that the plaintiff was disentitled to relief. It appeared, however, that the bitters known as Angostura Bitters had been previously made by Dr. Siegert at Angostura, and had acquired an extensive reputation; that at his death, the plaintiffs, who were his heirs, succeeded to his business and continued to carry it on, using the same formula and manufacturing the same article. Subsequently, they removed to the Port of Spain. Upon these facts, Justice Fry said that he could not see anything in the wrapper that amounted to

a fraudulent misrepresentation by reason of which the plaintiff should be denied relief. Furthermore, it appeared that the label containing the so-called misrepresentations was adopted since the beginning of the suit, and Justice Fry said that it was therefore collateral to the action and not material. (For a decision to the contrary upon exactly the same facts, see *Siegert* v. *Abbott*, 61 Md., 276; 48 Am. Rep., 101, severely criticized in Brown on Trade-marks, pages 83 to 85.

Fetridge v. *Merchant*, 4 Abbott's Pr., 156.

Facts the same as those of *Fetridge* v. *Wells*, the Extract of a Thousand Flowers case. Judge Hoffman said: "I have always considered that upon this branch of the subject the conduct of the defendant has a material influence. Has he deliberately, without any previous connection with the particular business, but simply to break in upon the trade and profit by the notoriety obtained by another, adopted his emblems and appellations? If he has, then in my view the question should be judged of solely as between the immediate parties and the public should be left to its own guardianship."

Ford v. *Foster*, 7 Chanc. App., 611.

The plaintiff was the maker of shirts of a particular sort, which he called "Eureka Shirts." On each shirt he had stamped the name "The Eureka." Action to enjoin the defendant from using that name. The plaintiff had previously represented himself in advertisements as a patentee of the shirt, which he was not. *This misrepresentation had ceased at the time of the suit. It was relied upon, however, as a defense.* The court held that if the plaintiff would have any right at law against the

defendant he would be entitled to have that legal right protected in equity. And the cases of *Piddington* v. *How*. *Perry* v. *Truefitt*, and *Flavvel* v. *Harrison* were referred to as holding merely that the matter should stand over until the plaintiff could establish his legal right by an action at law. If the trade-mark in itself were fraudulent, no relief at law upon the basis of that trade-mark could be afforded; but in this case the misrepresentation was collateral to the trade-mark and not a part of it. The plaintiff, in our opinion, had an action at law. The court held that it must therefore grant an injunction "because it cannot be right that if the plaintiff is allowed to maintain his action that he should be obliged to bring perpetual actions at law instead of having his action in this court."

Bardou v. *Lacroix*, 27 Annales, 214. Brown on Trade-marks, p. 83.

The plaintiffs were makers of cigarette paper and had given to their product the name of papier goudron (tar paper), which had acquired great popularity. They brought suit to enjoin the defendants from imitating their wares. In the lower court the defendant was victorious, on the ground that the plaintiff was disentitled to redress by reason of false misrepresentation, as the paper did not contain a particle of tar. The French Court of Cassation, however, reversed the ruling of the lower court.

Meriden, etc., Co. v. *Parker*, 39 Conn., 450; 12 Am. Rep., 401:

Certain brothers by the name of Rogers acquired a high reputation as manufacturers of silver forks and spoons. They sold the right to their trade-mark, which

contained their name, Rogers Brothers, to the plaintiff, the Rogers Brothers agreeing, however, to give their personal superintendence to the manufacture of the plaintiff's goods. The plaintiff sought to enjoin the defendants from imitating this trade-mark. The defense was made *inter alia* that the trade-mark falsely represented Rogers Brothers to be the manufacturers instead of the plaintiff. It appeared that while the trade knew that the plaintiff was the manufacturer of the goods stamped with the trade-mark, the consumers supposed that Rogers Bros. were in fact the manufacturers. The Court held: "The principle of law underlying this "objection is fully conceded, and that is that courts of "equity will not protect a trade-mark which deceives "the public. We do not suppose, however, that that "deception need be of such a character as to work a "positive injury to purchasers, *nor, on the other hand,* "*that every erroneous impression which the public, or a* "*portion of the public, may receive, will be sufficient to* "*destroy the validity of the trade-mark.*" In this case the goods of the plaintiff are manufactured under the superintendence of Rogers Brothers. The representation of the trade-mark was, therefore, in an important sense, true. All the public cared to know was that the goods were the production of their skill and experience. The fact that the plaintiff furnished the capital, machinery, and conducted the business, is entitled to little weight, although in another sense they were the manufacturers of the goods. There is no misrepresentation such as is contemplated by the cases refusing relief to a false trade-mark.

Simons Medicine Co. v. *Mansfield Drug Co.*, 23 S. W., 169:

One A. Q. Simons, a farmer in Georgia, came into the possession of a secret formula for the making of a valuable liver medicine. In 1840 he and his son, M. A. Simons, entered upon a plan of putting it on the market. Shortly afterwards they separated, agreeing that each might go on making and selling the medicine. M. A. began to advertise extensively, selling it as Dr. Simon's Liver Medicine and Dr. M. A. Simon's Liver Medicine. The father transferred his right to another son, C. A., who, in turn, sold it to the defendants. M. A. sold his right to the plaintiff. Immediately a bitter rivalry sprang up and this action was brought by the plaintiff to enjoin the defendants from imitating the plaintiff's name and label. One of the defenses was that the complainant did not have clean hands—(*a*) because, in a circular scattered broadcast, it was stated that M. A. was the discoverer; (*b*) the plaintiff's packages contained the following: "Trade-mark, registered, consisting of name, "picture and autograph, November 11, 1843," when in fact the trade-mark of the plaintiff had not been registered at that time; (*c*) each package contained the statement, "This is the only original and genuine Simon's "Liver Medicine," when, as above appears, there was other genuine medicine on the market. The court quotes the statement of the rule from Brown on Trade-marks, Sections 71 and 87, to the effect that there must be a fraudulent intent to mislead in order to disentitle the plaintiff to relief and says that the statement that M. A. Simons was the original discoverer would have undoubt-

edly disentitled the plaintiff to relief but for the fact that this statement was made only in one circular and had not been made since, although it was true that this circular was widely circulated. As to the statement on the packages about the trade-mark, the court says: "But "we do not think it was intended thereby to mislead the "public as to any material matter, or that it did so mis-"lead the public." In the controversy between the plaintiff and the defendants, the plaintiff wished to show his early connection with the medicine. He had registered on November 11, 1843, a book called "Dr. Simons' "Vegetable Liver Medicine, prepared solely by A. Q. "Simons and Son, Walker County, Georgia." The statement on the packages was intended to call attention to the cardinal fact of Dr. M. A. Simons' early connection with the medicine as a proprietor, and in this sense the label states the truth. The statement in other respects is wholly immaterial, absurd and inocuous, because there was no law for registering trade-marks in 1843. As to the statement that the plaintiff's medicine was the only genuine medicine, this also was not true, but the statement was made by M. A. Simons with no intent to deceive, as it clearly appeared that he believed the defendant did not have the proper formula and had throughout consistently contended so. Furthermore, he attached the greatest importance to the word "medicine," which he had originally used. His statement was true in the sense that it continued the ancient name with the ancient formula. The plaintiff was accordingly granted relief.

Smith v. *Sixbury*, 25 Hun., 232 :

In this case, the name "Magnetic Balm" was held to be a valid trade-mark for a medicine, although it contained neither magnetism nor electricity. The Court held that it did not contain any fraudulent suggestion.

Tarant Co. v. *Hoff*, 76 Fed., 957.

The plaintiff was the proprietor of Johann Hoff's Malt Extract and brought suit to enjoin the defendants from imitating its labels. "Nor do we find that com-
" plainant is disentitled to relief in equity by reason of
" any false representations in its own labels as to the
" place of origin of the extract itself. Some of the
" statements they contain, survivals from the older labels,
" are not now strictly accurate, notably the words 'Moritz
" Fisher, Sole Agent for U. S. of America,' but they
" are immaterial. The labels certainly contain no state-
" ment that the extract is made in Germany, while the
" record shows that the complainant has been to no
" inconsiderable expense to advertise its new industry
" of manufacturing the Johann Hoff's Malt Extract in this
" country. The criticism that its label states that there
" is such a factory and brewery in New York, when
" complainant is at Newark, is too trivial to merit dis-
" cussion."

Conrad v. *The Joseph Uhrig Brewing Co.*, 8 Mo. Ap., 277 :

The plaintiff was the seller of Budweiser lager beer and brought suit to enjoin the defendant from selling beer under that name. The defendant set up that the plaintiff was not enlitled to relief because the name Bud-

weiser indicated beer made in Budweis, when in fact it was made in St. Louis, and further, that the labels stated that the beer was made of the best imported hops and barley, which was not true. To this the court said: "It "is contended that the law can afford no protection to "plaintiff because his so-called trade-mark or label was "in itself a misrepresentation. This beer, it is said, was "not Budweiser beer. That it was not Budweiser beer "in the sense that it was not made in Budweis is true, "but it does not appear that it was held out to the "public either as actually made in Budweis or as a "foreign article. The statement on the label explains "that it was not made at Budweis, but by the Budweiser "process. Whether there was anything peculiar to Bud- "weis about this process or not, it seems that this beer "was really made as beer made in Budweis, of the best "barley and hops, and with the same preparation of "mash. The label states that it was made of the best "Saazar hops and imported barley. If this was not "literally true, the testimony is that it was a distinction "without a difference, imported hops exclusively were "used. There were frequently other hops, but they "were always of the same excellent quality as Saazar "hops and of the same peculiar properties, and were "always imported hops. The barley was not imported, "but a select quality of American barley, equal to "imported barley was always used. There was no testi- "mony tending to show any imposition upon the public "by the plaintiff. The testimony is that the public was "furnished by him with an excellent quality of beer "made of imported hops and of barley equal to any to

" be found in Europe or America." The Court accordingly granted the injunction.

In *Funke* v. *Dreyfus*, 34 La. Ann., 80, the plaintiff advertised its bitters as "imported." As a matter of fact these bitters were not imported, but as there was no evidence of intention to deceive the public, the Court granted the plaintiff relief.

In *Moxie Nerve Food* v. *Baumbach*, 32 Fed. R., 205, the trade-mark sought to be protected asserts:—

" That the Moxie Nerve Food contains not a drop of " medicine, poison, stimulant or alcohol, but is a small " sugar-cane like plant grown near the equator, and fur- " ther south; was lately accidently discovered by Lieut. " Moxie; and has proved itself to be the only harmless " and effective nerve food known, that can recover brain " and nerve exhaustion."

It will be observed that the statement is made that the compound does not contain a drop of alcohol. As a matter of fact, alcohol was used to cut the flavoring oils, but it passes off, to a great extent, in the evaporation necessary for its manufacture. But it was found that there was alcohol left in the preparation.

It was also claimed that Lieut. Moxie discovered the preparation. That fact was not shown, though it was denied, and even the existence of such a person as Moxie was denied. It appears, however, that there was such a person as Moxie.

The advertisement was that it is a small sugar-cane like plant grown near the equator, and further south. It would seem that vegetable matter was only a small part of the compound, for the Court says:—

" The extracts of the chemist of the contents of the " bottles show a palpable quantity of the extract of

" vegetable matter after all else has been spirited away " by the action of the heat."

Notwithstanding all these extravagant statements made on the bottles, some of which were flavored by absolute falsehood, the Court granted the injunction.

Rogers Mfg. Co. v. *Rogers & Spurr Mfg. Co.*, 11 Fed. R., 495.

This case is instructive, and the well considered and well expressed opinion of Lowell, C. J., is entitled to great consideration.

W. Rogers & Son had acquired a reputation for a certain kind of plated silver-ware, and for a time were interested with the complainant corporation in the business, but at the time the suit was brought had ceased all connection with it. The goods were still known, however, as "Rogers & Son's" goods. The Court says: "The " defendants insist that the plaintiffs have made false " and fraudulent statements to the public, to the " effect that they are still manufacturing under the " direction and management of William Rogers, and " William Rogers, Jr., both parties have fallen into " the mistake of supposing that it was important " to have a Rogers and his son to authorize them " to use the trade-mark, Rogers & Son. The law " is not so. Any one might use that trade-mark for the " first time that it was used, and if there was no Rogers " in the same business no Rogers could complain. (*Levy* " v. *Walker*, L. R. 10 Ch. D., 436; *Massam* v. *Thurley* " *Co.*, L. R., 14 Ch. D., 748. It was unnecessary for the " plaintiffs to send round pictures of William Rogers and " his son, as they have done. Such a method of adver-

" tising is more appropriate to the trade in patent medi-
" cines. But I do not quite see the injury to the public
" in this course of action. I think there is little doubt,
" upon the facts proved, that the reputation which the
" goods marked 'Rogers' Son, and Rogers & Bro., and
" Rogers Bros. have now acquired, depends upon the
" conduct of those who now use those names, and not
" upon any supposition in the minds of the purchasers
" that the persons who originated the business still con-
" duct it. Under these circumstances it does not seem to
" me that the plaintiffs have disentitled themselves to
" relief."

We respectfully submit that the defendants in the above case made a much stronger showing against the plaintiff there than was ever, in any case, made against the complainant here, even before its packages were changed.

The entire decision of the Court is well worthy of perusal.

Price Baking Powder Co. v. *Fyfe*, 45 Fed. R., 799.

It appears that the plaintiff and its grantors had been making a baking powder known as "Price's Cream Baking Powder." As a matter of fact there was no cream whatever used in the preparation. The Court speaking of the word "cream" as used by the complainant, says: "The
" complainant is certainly entitled to protection in the
" use of this word, in connection with the baking powder
" it manufactures, unless it is adopted and used as
" descriptive of the article, its ingredients or character-
" istics. The word 'cream' in combination with the
" other words, 'Dr. Price's' or 'Price's Baking Powder'

"designates an article which as thus named was "unknown in the trade until adopted in 1866. It is not "descriptive of an ingredient of the article, or of its "quality or kind. The baking powder is neither com- "posed in part of cream, nor does that word convey the "idea that it is the 'best' or 'choicest,' as asserted by "the defendant. It is true the word 'cream' is often "used to designate the best part of a particular thing, "but not the thing itself, as for instance, the cream of a "story; but only in that relation has the word any such "significance. The complainant had a right to appro- "priate a word which had not been previously used to "identify his particular manufacture, and distinguish it "from articles of the same general nature, manufactured "and sold by others. When launched upon the market "it must be given a name by which it could be recog- "nized. It was called 'Cream Baking Powder'—a "word appropriated by the manufacturer—so that his "article would thereafter be known, dealt in, and distin- "guished from others. 'The first appropriator of a name "or device . . . which, by being associated with "articles of trade, has acquired an understood reference "to the originator or manufacturer of the articles, is "injured whenever another adopts the same name or "device for similar articles, because such adoption is, in "effect, representing falsely that the productions of the "latter are those of the former.' *Lawrence Manuf'g* "*Co.* v. *Tennessee Manuf'g Co.*, 11 Sup. Ct. Rep., 400, "March 2, 1891."

Societe Anoyme, etc., v. *West Distilling Co.*, 43 Fed. R., 416, was where an injunction should have been refused,

if there is anything whatever in appellant's contention in this case. One would suppose from reading the decision that the Court was particularly ingenious in discovering reasons for sustaining the injunction, notwithstanding fraudulent representations made by the plaintiff.

It is impossible for any one to read the advertisements of the liqueur manufactured and sold by the complainant in that case without receiving the impression that it is actually manufactured by the Benedictine Monks of the Abbey of Fecamp from herbs grown on the fallows of Normandy. Yet the fraud of the defendant upon the complainant and the public was so manifest that the Court granted the injunction.

Selchow v. *Baker*, 93 N. Y., 53, overruling *Fetridge* v. *Wells*, cited by the defendants in all actions of this character, is a very instructive and applicable case.

In *Cleveland Stone Co.* v. *Wallace*, 52 Fed. Rep., 431, the question was as to whether a statement upon plaintiff's goods not strictly true was yet so incorrect as to disentitle the plaintiff to relief. It seems the plaintiffs manufactured scythestones at a place called Grindstone City, Michigan, and placed upon the different scythestones different labels.

The Court says:—

"It is claimed that the case of the plaintiff is brought " within the operation of this rule by its own and its " predecessors' circulars and catalogues, stating that the " various patterns and brands of scythestones in contro- " versy are made at, *e. g.*, the 'Willow Creek Quarry,' " 'Green Farm Quarry,' 'Pt. Au Barques Quarry,' etc., " and 'from selected Huron grit,' 'from the best blue " 'Huron grit,' etc., whereas, the stones of various " names were made from the same quarries. The con-

'text in which these statements are found makes it "plain that the quarries thus designated are located at "Grindstone City, Mich., and in some cases this is ex- "pressly stated. There is nothing to prevent plaintiff "from thus nominally subdividing its properties at that "place, or giving to these titular subdivisions such names "as fancy may suggest. There is in such nomenclature "no material false statement, nor is the public misled "into the purchase of one class of goods instead of an- "other. If the manufacturer chooses to associate one "brand or trade-mark of his goods with a name arbi- "trarily given to a part of his works or quarries, no "wrong is done to the public, so long as he furnishes the "identical article demanded by the preference of his "customers. The representation that the stones are "made from 'selected' or 'the best blue Huron' grit "are substantially satisfied if the quality of the materials "used is not inferior to that which the trade have "accepted as of that grade.

"The points of difference between the stones made "and sold by plaintiff under the names of 'Quinnebog,' "'Western Red Ends,' 'Star,' 'Diamond,' 'Clear Grit,' "'Lake Huron,' mainly consist in patterns, size and "finish. The 'Western Red Ends' are distinctly marked "in the manner suggested by the name. The 'Quinne- "'bog' is characterized by a peculiar finish. The fact "that all are made from the same quarries or rock for- "mation is not evidence of a material false statement."

The following cases are in point:

Metzler v. *Wood*, 8 Ch. Div., 606.
Alexander v. *Morse*, 14 R. T., 153; 51 Am. R., 369.
Chappal v. *Sheard*, 2 Kay & J., 117.
Chappal v. *Davidson*, 2 Kay & J., 123.
Clark Thread Co. v. *Armitage*, 74 Fed., 936.
Comstock v. *White*, 18 How. Pr., 421.
Bloch v. *Standard, etc., Co.*, 95 Fed., 978.
Hoxie v. *Chaney*, 143 Mass., 592.
Comstock v. *White*, 18 How. Pr., 421.
Curtis v. *Bryan*, 36 How. Pr., 333.
Dole v. *Smithsen*, 12 Abbott's Pr., 237.

Dickson's Crucible Co. v. *Guggenheim*, 2 Brewster, 321.
Electro-Silicon Co. v. *Hazard*, 29 Hun., 369.
Edelsten v. *Vick*, 68 Jr., 7.
Feder v. *Benkert*, 70 Fed., 613.
Holloway v. *Holloway*, 13 Bevan, 209.
Keasby v. *Brooklyn Chemical Works*, 142 N. Y., 467.
Lee v. *Haley L. R.*, 1 Ch. Div., 155.
Marshall v. *Ross*, 8 Eq., 651.
Pillsbury v. *Pillsbury*, 64 Fed., 841.
Sen Sen v. *Britton*, 1891 Ch., 692.
Shaver v. *Heller, etc. Co.*, 108 Fed., 821.

All the authorities are agreed that if complainant can make anything like a satisfactory explanation of a seemingly false statement on his labels, and in his advertisements, he will not be turned out of court.

Apply this principle to the case at bar and the court must listen to our complaint against our adversary.

In 1894 the complainant left off the words "California Liquid Fruit Remedy" from the label on the bottle and in May, 1896, entirely changed the carton as before stated. Since these changes were made, we respectfully submit that, the most censorious critic cannot find just cause of reproach.

At the time the defendant, Clinton E. Worden & Co., flooded the market of the Pacific Coast with an imitation of plaintiff's medicine, the carton and the statements thereon were not only unobjectionable but declared fully the truth. The attention of the Court is here called to "Exhibit A," opposite p. 634. An inspection shows at once that all the objections theretofore made have been entirely obviated. After the name, which is printed in large capitals comes the following in small capitals, but so

plainly printed that there is no room for mistake: "This " excellent remedy presents in the most acceptable form " the medicinally laxative principles of plants known to " act most beneficially, to cleanse the system effectually, " to permanently overcome habitual constipation and the " many ills dependent on it; to dispel colds and head- " aches and prevent fevers, to act gently yet promptly on " the kidneys, liver and bowels. The juice of figs in " the combination is to promote the pleasant taste." What more can be said? Here is a frank declaration that the medicinal virtues of the preparation do not come from the juice of figs, and that the only purpose of figs in the combination is to promote the pleasant taste. On the other side of the carton is a printed statement regarding the character and efficiency of the remedy. Among other things is the following: "Its " efficiency and delicacy of flavor are due to the medicinal " and agreeable qualities of plants and aromatic carmina- " tives, skillfully combined with pleasant liquids, among " which may be mentioned the juice of figs." Another side of the carton is taken up with similar statements in the German language, while the fourth side is occupied by the same declaration in French and Spanish.

If the Court will now read the decisions adverse to complainant, and especially the opinion of the Circuit Court of Appeals in the Sixth Circuit, reported in 73 Fed. R., it will see that if the record before those Courts had been like the one before this, their decisions would have been for the complainant. In the case last cited the Court expressly declares that but for these alleged false statements of complainant it would be entitled to relief.

We insist first, last and all the time that *the statements contained on the packages or cartons of complainant are strictly true.* If objection is made on the ground that the name "Syrup of Figs" is in itself a misnomer or fraudulent, four things should be borne in mind. First, that the name was perfectly legitimate when adopted. Second, that it is the custom in the drug business (see testimony of Mr. Henry Michaels (pp. 215-216), to use a fancy name or phrase without regard to whether the name truly indicates the character of the article. This may not be in accord with the highest ethical principles, but has become in the drug business a universal custom. Third, that complainant, beginning first in 1887 in medical journals and afterwards in general newspapers and by circulars distributed by the million, has notified the world that the medical properties of the compound come from senna (pp. 63, 601-619). It was agreed that other exhibits to the same effect need not be printed (see p. 5). But the originals were before the Circuit Court of Appeals. They were sent up as part of the original record. (See bottom of p. 592 and top of p. 593.) Some of them were most appropos to complainant's contention.

The attention of the Court is called to the active efforts of complainant, to eliminate all just objection to the name by advertising far and wide the facts about the composition of the medicine (see Record, pp. 55, 56, 57, 58, 59, 60, 61, 62, 63 and 64. We do not believe a person can be found who will testify that he bought the medicine supposing it to be different in its composition from what it really is.

The defendant put witnesses on the stand who

testified as to what they supposed the medicine to be, from the name, but not one was called who ever bought the medicine. It is safe to say that all persons who actually need a laxative and buy complainant's remedy know just what they are buying. If complainant cannot obtain relief from the Courts it is not because any man, woman or child has been actually deceived.

Fourth, the statements on the carton carry the "antidote with the bane," to use the language of the Court in *Centaur Co.* v. *Robinson*, 91 Fed. R., 881. That case was where an attempt was made by the defendant to turn the plaintiff out of Court on the ground of a false statement contained in the plaintiff's label. The language of the Court is as follows:

"The first reason suggested why the plaintiff in this "case is not entitled to a decree restraining the defend- "ant from pursuing his business in the form he was car- "rying it on at the time the bill was filed is that on the "wrappers of the plaintiff's medicine, which is put upon "the market and sold to the public, is found the claim "or statement that the compound so sold is purely vege- "table, and it is insisted that the compound contains "bicarbonate of soda and Rochelle salts, which are min- "eral compounds. I do not regard the isolated state- "ment quoted as constituting a fraud of such a character "as that it ought to defeat the complainant's right to "invoke the assistance of the court. And, if there was "any such misrepresentation in that regard, the wrapper "carries the 'antidote with the bane,' because, in describ- "ing the ingredients as they are compounded in the "medicine, it appears that the ingredients are truth- "fully stated; and if Rochelle salts or bicarbonate of "soda, or any other ingredient that enters into the "medicine as compounded, is a mineral, the misstatement "is corrected at once by the statement on the wrapper, "which correctly names all the ingredients of which the

" medicine is compounded. I do not think this objection " is tenable."

By turning to the case of *Centaur Co.* v. *Neathery* in the same volume, at page 893, it will be seen just what the label was that is referred to by the Court in the foregoing opinion. Under the word "CASTORIA," the following words appear in quite large letters: "A " vegetable preparation for assimilating the food and reg- " ulating the Stomachs and Bowels of Infants and Child- " ren. Promotes Digestion, Cheerfulness and Rest. " Contains neither opium, morphine, nor mineral. Not " Narcotic."

It will be observed that there are two statements made. First: that it is a vegetable preparation, and second, the positive assertion is made that it does not contain any mineral. Just below these in small script is: "Recipe of old Doctor Samuel Pitcher," and in what purports to be this recipe we find Rochelle salts and bicarbonate of soda. There is no positive statement that this is the recipe for the compound, yet the Court held that by reason of this recipe being printed on the package the antidote to the false statement conspicuously printed as above set out is given. The attention of the Court is called to page 891, where the learned Judge in *Centaur* v. *Robinson* clearly states the true principles to be applied in cases of this kind, where a name is used upon articles of small value, giving the dishonest retail dealer the opportunity to supply the goods of the defendant, in response to a demand for the goods of the plaintiff.

The above case of *Centaur* v. *Robinson* is correct in principle, because it has been many times decided, that

even if statements are made which are not strictly true, the Court will not for that reason alone turn the plaintiff out by the shoulders. The principle to be deduced from the authorities is as follows: Unless the untrue representations are shown affirmatively to be material representations, and directly calculated and intended to deceive the public as to the character of the preparation used, the plaintiff will not be turned out of Court. This is the substance of all the later decisions upon the subject.

We insist that this principle and the authorities above cited are conclusive of the case. It is the turning point, and if the Court is of the opinion that the Complainant ought not to be taken by the shoulders and thrust out of a court of justice, the judgment of the Court below was right.

FRAUDULENT USE BY CLINTON E. WORDEN & CO. OF THE NAME SYRUP OF FIGS.

It was urged in the Court below, and is here, that the injunction goes too far in restraining the defendant in that Court from using the words "Syrup of Figs" or "Fig Syrup," as applied to a liquid laxative medicine.

The injunction does not forbid the defendant in the Court below, to make and sell a syrup of figs, using the words in their descriptive sense. What is enjoined, is the use of the name "Syrup of Figs" AS APPLIED TO A LAXATIVE MEDICINE.

The authorities in support of the judgment of the Court below as to the form of the injunction are uniform. We do not believe a well considered case can be found that would justify the refusal of an injunction against the use

of these words when applied to a laxative medicine. Why is appellant so anxious to be permitted to use the name of Complainant's medicine upon its packages? The record clearly shows why. It is because it is the name of a well known and very popular article, and if appellant defeats the injunction placed upon it by the Court below, it can do what was being done when this suit was brought, that is, sell its goods to retail dealers, who can and will, in answer to the call from a customer for "Syrup of Figs," pass out and sell petitioner's compound. If petitioner is successful in its contention it will be at liberty, and from what it has already done it will certainly avail itself of the opportunity, of perpetrating a fraud not only upon the complainant and ruining its business, but upon the public.

As we said before, the authorities, to the effect that, if the complainant is entitled to relief at all, it is entitled to an injunction entirely forbidding the use of the name as applied to a laxative medicine, are uniform.

Not one of the following cases, where the use of a name was entirely forbidden, but had more justification for the use of the name contended for, than Clinton E. Worden & Co. has for using the name "Syrup of Figs," as applied to a medicine.

All the cases cited below are based upon the theory that the defendant was using a name for a fraudulent purpose, viz.: to sell his goods as the goods of plaintiff.

"GLENFIELD STARCH" case. The defendant was enjoined from using the name of the town Glenfield, where he manufactured his starch.

Wotherspoon v. *Currie*, L. R., 5 H. L. 508.

There could be no trade-mark in the name "Glenfield," because it was a geographical name. The injunction was granted on the ground that the *defendant was using the name "Glenfield," as applied to starch*, in order to sell his goods as the goods of plaintiff.

"STONE ALE" case. There the defendant was enjoined from using the name of the town Stone, where he manufactured his ale.

Thompson v. *Montgomery*, 4. Ch. Div. 35, 50.

"GUINEA COAL" case was where the defendant was enjoined from using the name of the street where he carried on the coal business, or using the name "Guinea Coal Co."

Lee v. *Haley*, 5 Ch. App. Cas. 155.

"ANATOLIA LICORICE" case was where the defendant was enjoined from using the name of the country "Anatolia," as applied to a licorice.

McAndrew v. *Bassett*, 10 Jr., N. S., 40, 4 De Gex J. & S. 380.

"ETHIOPIAN," as applied to black cotton stockings.

Hine v. *Lart*, 10 Jr. 106.

"LONDON CONVEYANCE CO." case was where the defendant was enjoined from using the words "Conveyance Company" or "London Conveyance Co." or "Original Conveyance Co."

Knott v. *Morgan*, 2 Keen, 213.

"CAMEL HAIR BELTING" case.

Reddaway v. *Panham*, 1896 App. Cas. 199.

"YORKSHIRE RELISH" case.

Powell v. *Birmingham Vinegar Brewery Co.*, L. R., Ch. Div. 1895, Vol. 3, 449.

"CLUB SODA" case.

Cochran v. *McNish*, 1896 Appeals, 225.

The foregoing are all English cases, decided upon the proposition laid down in

Levy v. *Walker*, 10 Ch. Div. 436,

as follows:

"YOU MUST NOT USE A NAME, WHETHER FICTITIOUS OR "REAL, OR A DESCRIPTION, WHETHER TRUE OR NOT, WHICH "IS INTENDED TO REPRESENT TO THE WORLD THAT YOUR "BUSINESS IS MY BUSINESS, AND THEREFORE DEPRIVE ME, "BY A FRAUDULENT MISSTATEMENT OF YOURS OF THE "PROFITS OF THE BUSINESS WHICH WOULD OTHERWISE COME "TO ME."

"GARRETT'S SNUFF" case was where the defendant was enjoined from the use of its own name—"T. H. Garrett & Co., or the name "T. H. Garrett" in connection with the manufacture of snuff.

"AKRON CEMENT" case, *Newman* v. *Alford*, 51 N. Y. 192, where the defendant was enjoined from using the word "Akron" as applied to cement, though it plainly appeared upon the package that it was manufactured at Syracuse and not at Akron.

"EXTRA DRY" case, where the defendant was enjoined from using the words "Extra Dry" as applied to champagne.

Von Mumm v. *Frash*, 56 Fed. R. 830.

"ST. LOUIS LAGER BEER" case, where the defendants were enjoined from using the words "St. Louis Lager Beer."

Anheuser Busch Association v. *Piza*, 24 Fed. Rep. 149.

"ST. LOUIS WHITE LEAD" case was where the defendants were enjoined from using the words "Southwestern St. Louis" as applied to white lead.

Southern White Lead Co. v. *Cary*, 25 Fed. R. 125, and *Southern White Lead Co.* v. *Coit*, 39 Fed. 492.

"NERVE FOOD" case, where the defendants were enjoined from using the words "Nerve Food."

Moxie Nerve Food Co. v. *Baumbach*, 32 Fed. 205.

"SINGER MACHINE" case, 163 U. S. 169.

"MINNEAPOLIS FLOUR" case, where the defendants were enjoined from using the word "Minneapolis" as applied to flour. See elaborate opinion of Circuit Court of Appeals.

Pillsbury-Washburn Flour Mills Co. v. *Eagle*, 86 Fed. 608.

"GERMAN SWEET CHOCOLATE" case.
68 Cal. 68.

"SLICED ANIMALS" case.
Selchow v. *Baker*, 93 N. Y. 53.

"BROMO-CAFFEINE" case.
Keasbey v. *Works*, 142 N. Y. 467.

"CONGRESS SPRINGS" as applied to a mineral water.

Congress Springs Co. v. *High Rock Congress Springs Co.*, 45 N. Y. 291.

"BETHESDA MINERAL WATER" case.

Dunbar v. *Glenn*, 42 Wis. 118.

"BLUE LICKS MINERAL WATER" case.

Northcutt v. *Turney*, 41 S. W. 21.

"CHICAGO WAISTS" case, where the defendant was enjoined from using the words "Chicago Waists."

Gage-Downs Co. v. *Featherbone Corset Co.*, 83 Fed. 213.

"RED CROSS PLASTERS" case.

Johnson v. *Baer*, 82 Fed. 662.

"BAKER'S CHOCOLTE" case.

Baher v. *Sanders*, 80 Fed. 889.

"CANADIAN CLUB WHISKEY" case.

Walker v. *Hockstæder*, 85 Fed. 776.

"PLYMOUTH GIN" case.

Collinsplatt v. *Finlayson*, 88 Fed. Rep. 693.

"DYSPEPSIA TABLETS" case.

Stuart v. *F. G. Stewart Co.*, 91 Fed. 243.

The "CARROM" case, as applied to a game.

Williams v. *Mitchell*, 106 Fed. 168.

"CELERY COMPOUND" case.

Wells v. *Seigel*, 106 Fed. 77.

The "QUEEN QUALITY" case, as applied to shoes.

Thomas G. Plarche Co. v. *May Co.*, 105 Fed. 375.

"HEALTH FOOD" case.

Fuller v. *Huff*, 104 Fed. Rep. 141.

"GOLD DUST" case, as applied to a washing powder.

Fairbanks v. *Suchel*, *etc.*, 102 Fed. 327.

"OXFORD BIBLE" case, 101 Fed. R. 442.

Taking up first the late cases in the Federal Reporter above cited for discussion, we desire to call attention to the sweeping character of the injunctions, that courts, in these times, are obliged to issue, in order to prevent the stealing of business.

"While a descriptive word or a geographical or per-
" sonal name cannot constitute a technical trade-mark,
" yet when as here, an article has come to be known by
" the descriptive word, one may not use that word to
" palm off his goods as the goods of another who has
" first adopted it, and by which appellation the goods
" have come to be known."

Opinion by C. C. A., Seventh Circuit.

Williams v. *Mitchell*, 106 Fed. Rep. 168.

The Court below allowed defendant to use the word "carrom," as applied to a game board offered for sale to the public, provided it was so used as to show that it was the carrom board manufactured by the defendant and not the plaintiff.

The Appellate Court held the name was descriptive and not subject to trade-mark, but as applied to a game board, offered for sale to the public, the complainant had the exclusive use of it.

Descriptive words "Celery Compound" may constitute a trade-mark and be entitled to protection as such in connection with a head of celery, when it is shown by long use they have acquired a secondary meaning, as identifying the particular production of complainant.

The Court said, "Under the trend of the later author-
" ities on this subject, the use of these words as a trade-
" mark designating this particular preparation may be
" sustained."

Wells v. *Seigel*, 106 Fed. Rep. 77.

In *Thomas G. Plant Company* v. *May Co.*, 105 Fed. Rep. 375, the Court below had held that the words "Queen Quality," as applied to shoes, were not entitled to protection. On appeal, the order was reversed, the Court holding:

" Where the general purpose of a trade-name adopted
" by a manufacturer is to identify the origin or owner-
" ship of the articles to which it is attached, his right to
" protection in the exclusive use of such name, is not
" affected by the fact that the words used also denote
" quality."

The Court cites with approval, *American Wash Board Co.* v. *Saginaw Mfg. Co.*, 103 Fed. 281, giving from the opinion in that case the following quotation: "The
" circumstances vary greatly, but the underlying prin-
" ciple which is effective in the solution of such cases is
" that a party may not adopt a mark or symbol which
" has been employed by another manufacturer and by
" long use and employment on the part of that other has
" come to be recognized by the public as denoting the
" origin of the manufacture, and thus impose on the

"public by inducing them to believe that the goods "which this new party thus offers are the goods of the "original party."

In *Fuller* v. *Huff*, 104 Fed. 141, the Circuit Court of Appeals, in a carefully prepared opinion, states the law applicable to the use by one of the trade-name of another with great clearness.

The Court below had refused to enjoin the use of the words "Health Food" as applied to a food product, *where there was no imitation of the packages* and when the evidence did not show fraud upon the part of the defendant.

The Appellate Court reversed the judgment and ordered the Court below to grant an injunction, in accordance with the prayer of the complainant.

The decision is so directly in point, that instead of quoting from it, we respectfully ask the Court to read it. The opinion is by Judge Shipman. The opinion of the Court below (99 Fed. 439) should also be read.

"A trade-name differs from a trade-mark in that it "appeals to the ear more than to the eye, and hence the "character of the label or package used by an imitator, "is of no great force in determining an infringement."

Fairbanks v. *Luckel, etc.*, 102 Fed. 327.

The foregoing is a decision of the Circuit Court of Appeals, reversing the Court below in holding that the trade-name "Gold Drop," as applied to a washing powder, did not infringe upon the name "Gold Dust."

The attention of the Court is called to the opinion and citation of authorities.

The trade-name "Syrup of Figs" appeals especially to

the ear. A party who has already used it recommends it by word of mouth to another.

The use of the word "Oxford" on bibles enjoined in 101 Fed. Rep. 442.

Stuart v. *F. G. Stewart Co.*, 91 Fed. 243, was where the Circuit Court of Appeals of the Seventh Circuit reversed the order of the court below refusing to grant an injunction. The Appellate Court said: "An "article may be advertised and become known by its "name, or by certain catch words easily retained in the "memory, an imitation of which may be sufficient to "deceive persons exercising ordinary care, though the "wrappers in other respects may be dissimilar." The court below had refused an injunction (See 85 Fed. Rep. 778) on the ground that the defendant was using its business name in good faith.

Garrett v. *Garrett*, 78 Fed. Rep. 472:

In that case an injunction was sought by the owner of a snuff that had become popular under the name of "Garrett's Snuff," as against a corporation of the name of "T. H. Garrett & Co." that put upon the market a snuff purporting to be manufactured by it. On motion for preliminary injunction the court below restrained the defendant from in any way imitating the plaintiff's labels, but refused to enjoin it from using its name "Garrett & Co." as the manufacturers. The plaintiff appealed. The decision of the Circuit Court of Appeals (Sixth Circuit) is so apropos to this discussion that we respectfully request the Court to read it. The Court of Appeals reversed the judgment and ordered an injunc-

tion "against the use of the name of the defendant 'T. H. Garrett & Co.'" or the name of "Garrett" as a part of the corporate name of the defendant, or in its business.

In its opinion the Court cites with approval *Rogers Co.* v. *Wm. Rogers Manuf'g Co.*, 70 Fed. 101–7.

In that case, too, the defendant was enjoined from using its name.

How much more is the complainant in the case at bar entitled to relief, where the defendant does not use its own name in labeling its goods, but assumes fictitious names resembling complainant's, for the manifest purpose of deceiving unwary customers. Further than that, it assumes the use of the name of complainant and makes it part of the fictitious name. This name of complainant too has become identified with its medicine. Observe the remarks of Judge Morrow upon this matter in 86 Fed. R. at p. 218, where he says, after speaking of *Redaway* v. *Banham*, to which we shall refer further on: "It will be observed that complainant's right is more "closely identified with the name of the article. The "name Fig Syrup or Syrup of Figs was not known to "the world as a liquid laxative until it was prepared by "the complainant and it was not then known as such an "article in any way distinguished from its production by "the complainant. *This is an important fact to be "taken into consideration in determining whether the "defendants are engaged in unfair competition.*"

Why did the defendants select this name as applied to a medicine? Is there any other answer possible than that it was done to sell their compound as and for plain-

tiff's medicine? Is it not a palpable theft of a trade? Will the Court protect the appellant in this fraud?

Lawrence Manufacturing Co. v. *Tennessee Manufacturing Co.*, 138 U. S. 537, was where a bill was filed to enjoin the use of the letters "L. L." upon sheetings, the plaintiff claiming a trade-mark right thereto. The Court, per Fuller, Chief Justice, decided that the plaintiff had no right to the letters "L. L." as a trade-mark. The court below had found *that the letters "L. L." were in common use by manufacturers of sheetings to designate 4-yard goods*, and such being the case, the plaintiff, though it had first used the letters "L. L.," was not entitled to a trade-mark, nor to the exclusive use of them. The Court said: "the significance of the letters "'L. L.' stamped upon cotton sheetings as indicative of "grade, class and quality, was generally understood in "the trade when defendant commenced the use of said "letters." It appeared that many other manufacturers used the same letters to distinguish the same class of goods.

At page 551 the Court says:—

"If in this case the letters 'L. L.' *formed an important "part of plaintiff's label* and the defendant had used "them in such a way and under such circumstances as "to amount to a false representation, which enabled it "to sell, and it did sell its goods as those of the plain-"tiff, and this without plaintiff's consent or acquiescence, "then plaintiff might obtain relief within the principle "of the cases just cited."

The italics are ours.

Now what are the cases "just cited" with approval?

They are—

The Glenfield Starch Case, and

The Stone Ale Case.

These two cases cited with approval, as above stated, dispose of the contention here. We copy herewith from pages 550 and 551, in the above report, what this Court says about those two cases:—

"In *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508, "the plaintiffs had manufactured starch at Glenfield, "which had become known as 'Glenfield Starch.' They "removed from Glenfield, but continued to call their "starch by the same name. The defendant, though his "place of business was at Baisley, *commenced manufact-* "*uring starch at Glenfield*, and selling the same in Scot- "land with the words 'Glenfield Starch' printed on the "labels. This was interdicted by the Court of Session, "but he continued to sell in England under a label of "which 'Glenfield' in larger or darker letters than "any other on the packets was the pronounced feature, "and the house of lords held that he was putting the "word 'Glenfield' on his labels fraudulently, and with "the intention of making out that his starch was the "starch of plaintiff, who had by user acquired the right "to the name of 'Glenfield Starch,' and enjoined him "from so doing. In *Thomson* v. *Montgomery*, 41 Ch. "Div. 35, 50, the plaintiffs and their predecessors had "for a hundred years carried on a brewery at Stone, and "their ale had become known as 'Stone Ale.' They "had registered several trade marks, which contained "the words 'Stone Ale' in combination with some "device or name of their firm, and in 1888 they "registered as an additional trade mark the words "'Stone Ale' alone. The defendant *built a brewery at* "*Stone*, over which he placed the words 'Montgomery's "'Stone Brewery,' with a device containing the words "'Stone Ale,' and a monogram somewhat resembling "the plaintiff's trade mark. It was held that the "plaintiffs could not register 'Stone Ale' as a trade "mark under the act of parliament in that behalf, but

" that they had acquired by user the right to the use of " the words 'Stone Ale'; and that, the conduct of the " defendant being, in the opinion of the Court, calcu- " lated to deceive the public into supposing that his ales " were brewed by plaintiffs, they were entitled to an " injunction. Lord Justice Lindley remarked that, " although the plaintiffs had no exclusive right to the " use of the words 'Stone Ale' alone as against the " world, or any right to prevent the defendant selling his " goods as having been made at Stone, yet, 'as against " a particular defendant who is fraudulently using, or " going to fraudulently use,' the words with the express " purpose of passing off his goods as the goods of the " plaintiffs, it appears to me that the plaintiffs may have " rights which they may not have against other traders. " In regard to that proposition, it appears to me that the " Glenfield starch case has an extremely important bear- " ing upon this case. The evidence in this case con- " vinces me that any ale which may be sold by this " particular defendant as 'Stone Ale' will be intended " by him to be passed off as the plaintiff's ale. I am " satisfied that he does not use the words 'Stone Ale' " for any honest purpose whatever, but, according to the " evidence, with a distinctly fraudulent purpose. Is " there any reason, then, why the Court should not deal " with him accordingly, and prevent him from carrying " out such intention, by restraining him from using the " words which he will only use for that purpose? In my " opinion the Glenfield starch case warrants us in going " that length as against this particular defendant."

It was after giving these quotations that the Court held that if plaintiff were using the mark "L. L." so as to form an important part of its label, and the defendant were using these letters so as to enable it to deceive customers, the defendant should be enjoined from using those letters.

We submit that this decision completely disposes of petitioner's contention.

In both the above cases the courts gave to plaintiffs the exclusive right to geographical names upon their goods. As is well known, geographical names cannot be appropriated as a trade-mark. How much stronger they are than this case where the defendant takes the name by which a medicine has become known in the market, and also adopts part of the corporate name of complainant for the sole purpose of enabling retail druggists to palm off its compound upon unwary or ignorant customers.

In *Singer Manufacturing Co.* v. *June Manufacturing Company*, 163 U. S. 169, and *Singer Manufacturing Company* v. *Bent*, 163 U. S. 204, this Court held that the word "Singer" as applied to a sewing machine, having been protected by U. S. Patent, one of the considerations for said protection was that at the expiration of the patent the name should become common property. It therefore held that anybody had a right to make a machine, in accordance with Singer Patent, and call it a Singer machine, but in both cases the Court made the following order:—

"It follows that the decree below must be reversed "and the cause be remanded with directions to enter a "decree in favor of complainant with costs, perpetually "enjoining the defendant, his agents, servants and "representatives, from marking upon sewing machines "made or sold by him, or upon any plate or device con-"nected therewith, or attached thereto, the word "'Singer,' or words or letters equivalent thereto, with-"out clearly and unmistakably specifying in connection "therewith that such machines are the product of the "defendant or other manufacturer, and not the manu-"facture of the Singer Manufacturing Co."

That is to say, the Court decided that the defendant had the right to use the word "Singer" as applied to sewing machines for the reasons hereinbefore stated, but in using the word "Singer" upon a machine, the defendant must also state as a part of the label or name that this particular machine was not manufactured by the original Singer Manufacturing Company, but by himself.

"Equity gives relief in such case, upon the ground "that one man is not allowed to offer his goods for sale, "representing them to be the manufacture of another "trader in the same commodity. Suppose the latter has "obtained celebrity in his manufacture, he is entitled to "all the advantages of that celebrity, whether resulting "from the greater demand for his goods or from the "higher price the public are willing to give for the "article, rather than for the goods of the other manu-"facturer, whose reputation is not so high as a manu-"facturer. Where, therefore, a party has been in the "habit of stamping his goods with a particular mark or "brand so that the purchasers of his goods having that "mark or brand know them to be of his manufacture, no "other manufacturer has a right to adopt the same "stamp; because, by doing so, he would be substantially "representing the goods to be the manufacture of the "person who first adopted the stamp, and so would or "might be depriving him of the profit he might make "by the sale of the goods which the purchaser intended "to buy. *Seixo* v. *Provezende*, Law Rep. 1 Ch. 195."

McLean v. *Fleming*, 96 U. S. at page 251.

"Chancery protects trade marks upon the ground that "a party shall not be permitted to sell his own goods as "the goods of another; and, therefore, he will not be "allowed to use the names, marks, letters, or other "indiciæ of another, by which he may pass of his goods "to purchasers as manufacture of another. *Newman* "v. *Alford*, 51 N. Y. 192."

Idem, page 255.

Newman v. *Alford*, cited above by this Court, is sometimes called the *Akron Cement case*. The Court there held that the plaintiff had the right to the geographical name "Akron" as a trade mark as against the defendant. The plaintiff placed upon the barrels of lime the following words: "Newman's Akron Cement Co., Manufactured at Akron, N. Y." The defendant labeled their barrels as follows: "Alford's Anondaga Akron Cement or Water Line, Manufactured at Syracuse, N. Y." The Court says, page 192:—

"They placed the word 'Akron' upon their label for "the purpose of increasing their sales and availing them- "selves of the reputation acquired by plaintiff's cement."

At page 195 the Court, speaking of trade marks, says:—

"The right must be exclusive as against the defend- "ant. It is generally sufficient, in such cases, if plaintiff "has the right and the defendant has not the right to "use it. The principle upon which the relief is granted "is that the defendant shall not be permitted, by the "adoption of a trade mark which is untrue and de- "ceptive, to sell his own goods as the goods of the "plaintiff, thus injuring the plaintiff and defrauding the "public."

The Court cites with approval *Lee* v. *Haley*, 5 Ch. App. Cas. 155, and goes on to say:

"In *Lee* v. *Haley* the plaintiff had for a series of years "carried on business as coal dealers in Pall Mall, Lon- "don, under the name of 'The Guinea Coal Company,' "and they were frequently called 'The Pall Mall Guinea "Coal Company.' The defendant, who had been their "manager, finally set up a business in the same street "under the same style of 'The Pall Mall Guinea Coal "'Company,' and while it appeared that there were other "Guinea coal companies in London, so that the plaintiffs "did not have the exclusive right to the use of the trade- "mark, 'Guinea Coal Company,' yet the Court held that

" they were entitled, as against the defendant, to be pro-
" tected in the use of the name. Lord Justice Gifford,
" writing the opinion of the court, says: 'I quite agree
" ' that the plaintiffs have no property in the name; but
" ' the principle, upon which the cases on this subject
" ' proceed, is, not that there is property in the word, but
" ' that it is a fraud on a person who has established a
" ' trade and carries it on under a given name, that some
" ' other person should assume that same name or the
" ' same name with a slight alteration, in such a way as
" ' to induce persons to deal with him in the belief that
" ' they are dealing with the person who has given a
" ' reputation to the name.' This case goes further than
" it is necessary to carry the rule in the case before us,
" because the words 'Pall Mall Guinea Coal Company'
" could be truthfully used by both parties. They both
" sold coal in Pall Mall for a guinea a ton. But here
" the defendants could not truthfully call their cement
" Akron cement, and they had no shadow of right to use
" the name. Their use of it was a fraud upon the plain-
" tiffs, and upon no other manufacturers.

" These views are not in conflict with the case of *The*
" *President, Managers and Company of the Delaware*
" *and Hudson Canal Company* v. *Clark*, recently de-
" cided in the Supreme Court of the United States, not
" yet reported."

. . . " That the name of a place can thus be appro-
" priated, has, during the present year, been decided on
" appeal in the House of Lords, in the case of *Wotherspoon*
" v. *Currie*, reported in 5 House of Lords, English and Irish
" Appeals (Law Reports), 508. In that case the plain-
" tiffs, and those to whom they succeeded, had formerly
" carried on the business of starch-makers at Glenfield,
" near Paisley, and their starch had become known in
" market and was sold as Glenfield starch. After the
" plaintiffs' starch had become thus known, they removed
" their starch-works from Glenfield to another small place
" near Paisley, and there continued to manufacture their
" starch, which continued to be known and sold as Glen-
" field starch. *The defendant afterward commenced to*
" *manufacture starch at Glenfield, and placed on the*

" *labels upon his packages of starch the word Glenfield,* " *and sold his starch as Glenfield starch. He claimed the* " *right to do this because his starch was made at Glenfield* " *and the plaintiffs' was not. But it appeared that he* " *used the word Glenfield for a fraudulent purpose; to* " *increase his sales at the expense of the plaintiffs, by* " *inducing the public to purchase his starch under the* " *belief that it was the starch made by the plaintiffs,* " *and it was held that the plaintiffs were entitled to be* " *protected in the use of the word as their trade-mark. The* " *defendant could truthfully apply the word Glenfield to* " *his starch, but he was restrained because he applied it with* " *a fraudulent and dishonest purpose.* In the case at bar " the defendants not only used the word Akron, as applied " to their cement, for a fraudulent and dishonest purpose, " but there is the additional element that they could not " truthfully use it, and, hence, for more reason than in " the case last cited, they ought to be restrained."

The italics are ours.

Von Mumm v. *Frash*, 56 Fed. Rep. 830.

In 1886 plaintiffs, at Reims, France, originated a champagne having a dry flavor, which has since been very extensively sold in the United States as "G. H. Mumm & Co.'s Extra Dry," and is distinctively known by the term "Extra Dry." The defendants sell an American wine in ordinary champagne bottles. "On the " upper part of the principal label they put the words " Extra Dry,' and also a colorable imitation of the impe- " rial mantle bearing a colorable imitation of the Mumm " trade-mark." The opinion of the Court was by Benedict, Judge. He says: "The words Extra Dry thus applied " to the wine in question when it was first put upon the " market have been so extensively used to designate this " particular wine that the words have come to be to a " large extent a name whereby to distinguish the wine as

"wine manufactured by the complainants and of the "quality of the wine originated by them in 1866."

After discussing the differences between the labels on the plaintiff's wine and the defendant's wine, the Court says:

"This difference in the principal labels is of little "importance, however, by reason of the fact proved, that "the principal label of a bottle of champagne is fre- "quently gone when served, or, if present when served, "frequently covered. For the same reason it is of little "importance to the present controversy that the defend- "ants put their own name upon the principal label of "their bottles and do not put there the name of G. H. "Mumm & Co. What is of importance is that the "defendants on the principal label of their bottles put "the words 'Extra Dry' coupled with an imitation of the "trade-mark of G. H. Mumm & Co. . . . . "In connection with the use of the words 'Extra Dry,' "by the defendants it is important to observe that the "testimony discloses that the words 'Extra Dry' are not "used by the defendants to describe any quality of their "article but for the purpose of fraud."

The Court finds: "That they do not use the words "'Extra Dry' for the purpose of describing any quality "of their article, but to enable their article to be put off "as the wine of complainants."

The Court quotes with approval the following language from *Koehler* v. *Sanders*, 127 N. Y. 74:

"There are cases where the right to use a name to "designate a product is so qualifiedly exclusive that the "right to the protection of its use against infringement "by others rests upon the ground that such use by them "is an untrue or deceptive representation. The appli- "cation of this principle is not necessarily dependent "upon a proprietary right in a name, or the exclusive "right to its use. But when another resorts to the use "of it fraudulently, as an artifice or contrivance to repre- "sent his goods or his business as that of the person

" so previously using it, and to induce the public to so " believe, the Court may, as against him, afford relief to " the party injured."

The Court then refers to *Thompson* v. *Montgomery*, and other cases, as follows:—

" In *Thompson* v. *Montgomery*, 41 Ch. Div. 35, cited " by the Supreme Court in the case of *Coats* v. *Thread* " *Co.*, hereafter referred to 149 U. S. 562, 13 Sup. Ct. " Rep. 966), the controversy related to ale manufactured " at Stone, in Staffordshire. There, in deciding to enjoin " the defendants from using the words 'Stone Ale,' " the Judge says (page 51):—

" I am satisfied that the defendant does not use the " words 'Stone Ale' for any honest purpose whatever, " but, according to the evidence, with a distinctly fraud- " ulent purpose. Is there any reason, then, why the " Court should not deal with him accordingly, and pre- " vent him from carrying out such intention, by restrain- " ing him from using the words which he will only use " for that purpose?"

In the case of *Johnston* v. *Ewing*, L. R 7 App. Cas. 219, the House of Lords say:—

" No man has a right to adopt and use so much of " his rival's established trade mark as will enable any " dishonest trader, into whose hands his own goods may " come, to sell them as the goods of his rival."

In *Manufacturing Co.* v. *Loog*, 18 Ch. Div. 412, it is said:

" No man is permitted to use any mark, stamps, or any " other means whereby, without making a direct false " representation himself to a person who purchases " from him, he enables such person to tell a lie, or " make a false representation, to somebody else, who is " the ultimate customer."

Says the Lord Chancellor in *Wotherspoon* v. *Currie*, L. R. 5 H. L. 517:

"It was long ago pointed out that it is not upon the "*mala mens* towards the buyer that the decision of the "case rests."

In *Lever* v. *Goodwin*, 36 Ch. Div. 1, the Court says:—

"Now, it has been said more than once in this case, "the manufacturer ought not to be held liable for the "fraud of the ultimate seller; that is, the shopkeeper "or the shopkeeper's assistant. But that is not the "true view of the case. The question is whether the "defendants have or have not knowingly put into the "hands of the retail dealers the means of deceiving the "ultimate purchasers.

"The question thus stated I consider to be the ques- "tion here, and the answer must be that the defendant "knowingly put into the hands of the retail dealers an "article of the defendants' manufacture, so dressed up "that, in the hands of the retail dealers, it is an effec- "tive means of deceiving the ultimate purchaser into "the belief that he is purchasing the champagne wine "of the complainant known as G. H. Mumm & Co.'s "Extra Dry."

The Court decided, page 839, what the form of the injunction should be, saying:—

"They should be also prohibited from placing words "'Extra Dry' upon any bottles of their product, of the "character that has been described, either in combina- "tion or otherwise. This upon the ground that the "words 'Extra Dry,' as applied by them to the article "they manufacture, constitute an untrue and deceptive "representation, made, not for the purpose of descrip- "tion, but for the purpose of fraud, and which are "calculated to deceive, to the injury of the complain- "ants."

Anheuser Bush Brewing Association v. *Piza*, 24 Fed. 149, is where Judge Wallace, of the New York Circuit, enjoined the defendant from using the words "St. Louis

Lager Beer," because the defendant could only use those words for the purpose of getting the trade of the complainants.

In *Southern White Lead Co.* v. *Cary*, 25 Fed. 125, the plaintiff used the following words upon its kegs of lead: "Southern Company, St. Louis." The defendants who were manufacturing white lead at Chicago, put on their kegs: "Southwestern. St. Louis." The Court, Gresham, Justice, closed its opinion by this order:—

"A temporary injunction will be granted restraining "the defendants from branding upon their kegs the "words 'Southwestern. St. Louis.'"

The Judge in his opinion says:—

"I shall not stop to inquire whether the complain- "ant's claim to trade mark is or is not well founded, as I "think it is entitled to an injunction upon another "ground. The defendants so brand the heads of their "kegs as to naturally mislead and induce persons pur- "chasing for consumption to suppose they are pur- "chasing the complainant's lead, when they are getting "an inferior article. . . . The defendants sell their "goods to retail dealers, and it may be that such dealers "are not deceived, but they sell to customers who are "or may be deceived. The complainant is entitled to "relief if the brand used by the defendants sufficiently "resembles the complainant's brand to be mistaken for "it, and the defendants adopt their brand for the pur- "pose of selling their kegs as the kegs of the complain- "ant, or for the purpose of enabling retail dealers to do "so, and the complainant has been injured by this fraud, "or is likely to be injured by it."

In *Southern White Lead Co.* v. *Coit*, 39 Fed. 492, Judge Blodgett at Chicago granted a similar injunction.

Moxie Nerve Food Co. v. *Baunbach*, 32 Fed. 205, is directly in point, as well upon the propriety of enjoining

the defendant from using a name to which the plaintiff has no trade-mark right as upon the proposition already advanced, that the plaintiff is not guilty of such fraud as will prevent the Court giving relief. This case is cited with approval by Judge Colt, in *Moxie Nerve Food Co.* v. *Beach*, 33 Fed. Rep. 248, and by Judge McKenna in *California Fig Syrup Co.* v. *Improved Fig Syrup Co.*, 51 Fed. Rep. 296. The opinion is by Judge Sabin. He approved the preliminary injunction granted in that case in the following words:—

"The defendants, and each of them, . . . are hereby "restrained and enjoined . . . from using the words "'Nerve Food,' either alone or with other words, upon "the outside or upon the wrapper of any package con- "taining the manufacture of a fluid resembling in taste, "flavor, or appearance the article manufactured by com- "plainants as 'Moxie Nerve Food.'"

Knott v. *Morgan*, 2 Keen, 213; *Cox Trade Mark Cases*, 637; was where the plaintiff, running omnibuses in London, painted on their omnibuses the words "Conveyance Company" and "London Conveyance Company." The defendant then placed on its omnibuses the same words, and sometimes "Original Conveyance Company."

The Court ordered an injunction forbidding the use of these words, and saying: "It is not to be said that the "plaintiffs have any exclusive right to the words 'Con- "'veyance Company,' or 'London Conveyance Company,' "or any other words; but they have a right to call upon "this Court to restrain the defendant from fraudulently "using precisely the same words and devices which they "have taken for the purpose of distinguishing their "property, and thereby depriving them of the fair profits

"of their business by attracting custom on the false "representation that carriages, really the defendants, "belong to and are under the management of the plain- "tiffs."

The *Collins Co.* v. *Brown case*, 3 Kay & Johnson, 423, was where there was no technical trade-mark, but the Court held:

"A person who has been in the habit of using a "particular mark, may prevent other persons from "fraudulently taking advantage of the reputation which "his goods have acquired, by using his mark in order to "pass off their goods as his, to his injury."

In rendering the opinion Sir Page Wood the Vice-Chancellor said:

"If a man has been in the habit of using a particular "mark for his goods for a long time, during which no "one else has used a similar mark, and then another "person begins to use the same mark, that can only be "with a fraudulent intent."

In Judge Morrow's opinion in *California Fig Syrup Co.* v. *Worden*, 86 Fed. Rep. 212, he refers to what is now the leading and most famous case upon the law of unfair competition in trade. It is a case that is now being continually referred to in the courts of England and this country as the fullest and most decisive discussion of the principles involved in cases like the one at bar. It is

Reddaway v. *Benham*, 1896, App. Cas. 199.

It was decided by the House of Lords and evidently all the Law Lords took part in the decision, each giving his opinion.

It seems that in 1877 Frank Reddaway had begun the manufacture of belting for machinery from hair and wool purchased in the market, and gave to his manufactured

product the name of "Woolen Belting." In 1879 he began to call the belting "Camel Hair Belting." The belting was stamped "Camel" or "Camel Hair." It seems that it was not known by the plaintiff or by Frank Reddaway, its grantor, that the hair which he bought in the market and out of which he made his belting was in fact composed principally of the hair of camels, and this fact did not come out until some time during the trial of the case, when, to the surprise of all parties, it was learned that the hair of commerce used by both the defendants and the plaintiff alike was actually camel's hair. Plaintiff's belting became very popular in foreign countries, especially in hot climates, and a large trade was built up. The article came to be known as "Camel Hair Belting." The defendant purchased the same kind of raw material, and commenced the manufacture of belting and called it "Camel Hair Belting," which was the exact truth.

Three material questions were submitted to the jury. The questions and their answers were as follows:—

1. Q. Does "camel hair belting" mean belting made by the plaintiff as distinguished from belting made by other manufacturers?

A. Yes.

2. Q. Does it mean belting of a particular kind without reference to any particular maker?

A. No.

3. Q. Do the defendants so describe their belting as to be likely to mislead purchasers and to lead them to buy the defendant's belting as and for the belting of the plaintiff?

A. Yes.

There was no question made in the case after it was ascertained that the material out of which the belting made by both the plaintiff and the defendant was in truth and in fact camel's hair, but what the name used by the defendant was materially and exactly true. Nevertheless the trial court "granted an injunction " restraining the defendants from continuing to use the " words 'camel hair' in such a manner as to deceive pur- " chasers into the belief that they are purchasing belt- " ing of the plaintiff's manufacture and from thereby " passing off their belting as and for the belting of the " plaintiff's manufacture."

This judgment was reversed by the Court of Appeals, from which judgment of reversal the plaintiff appealed to the House of Lords. Four days seem to have been given to the argument. Upon the argument the distinguished counsel for the plaintiff evidently relied principally upon the *Glenfield Starch Case* and the *Stone Ale Case*. The counsel for defendants contended that: " plaintiffs have tried to place a secondary meaning on a " plain English expression composed of ordinary words " and seek to prevent the whole world from using that " expression without some distinguishing words. There " is no authority for such a contention. Authority is " the other way. There is an inherent right to describe " one's goods in plain terms which are a true description " and not the less so because other people have used the " same description, and the plaintiffs cannot claim the " exclusive use of a truthful description such as 'camel " 'hair belting.' The defendants do no wrongful act, but

" are only exercising their natural rights in using a true " description and are not to be restricted because some " of the public may make mistakes. . . . There was " no imitation of the plaintiff's labels or marks. The " evidence did not support the findings. There was no " evidence of fraud and fraud is essential to the plaintiff's " case."

The House of Lords took some time for consideration, and at a subsequent date the Lord Chancellor, Lord Halsbury and the following ex-Lord Chancellors rendered opinions, viz: Lord Herschel, Lord Morris, and Lord Macnaghten. The discussion is so elaborate and so pertinent to the questions involved here that the attention of this Court is respectfully called to the four opinions rendered in the case. But this should at all times be borne in mind, that the name used by both the plaintiff and the defendant, for their product truthfully described the article, viz: that it was a belting made of camel hair. Therefore the Court had no power to prevent the defendant from using that name in the description of his goods, but it ordered a judgment as follows, viz:—

"An injunction restraining the defendants, and each of " them, from using the words 'camel hair' as descriptive " of or in connection with belting manufactured by them, " or either of them, or belting not being of the plaintiff's " manufacture sold or offered for sale by them, or either " of them, without clearly distinguishing such belting " from the belting of the plaintiffs."

The court in the decree follows the form given by this Court in *The Singer case* (163 U. S.).

In both cases this form was made necessary because of defendant's absolute right to use the name.

Another recent case in England often cited is the case of

Powell v. *Birmingham Vinegar Brewery Co.*, L. R. Ch. Div., 1894, Vol. 3, 449.

The plaintiff in that case had manufactured a sauce and given it the name of "Yorkshire Relish." He built up a large trade in the article and registered the words "Yorkshire Relish" as a trade mark. The defendant instituted an action under the British Statutes to have the registration of the trade mark "Yorkshire Relish" canceled on the ground that the words were not susceptible of being appropriated as a trade mark. After much litigation between the parties the trade mark was canceled for the reasons stated. Thereupon the defendant put upon the market a sauce to which it gave the name "Yorkshire Relish." The plaintiffs brought an action in equity to restrain the defendants. The decision of the lower court was that the defendants be restrained from using the words "Yorkshire Relish" as applicable to sauces other than those of the plaintiff's manufacture without clearly distinguishing the same from the sauce of the plaintiff. The defendants appealed from this order, contending that its terms were such that it prevented them using the words "Yorkshire Sauce" at all, and gave to the plaintiff a monopoly in those words to fully as great an extent as if they constituted of a valid trade mark. In the discussion by the Judges of the Court of Appeals it was assumed that the effect of the injunction was as stated by the counsel for the defendant.

The Court of Appeals affirmed the judgment of the Court below.

In the above case (the Yorkshire Relish case) there was no question of imitation of packages, except by the use of the words "Yorkshire Relish." The plaintiff's sauce was stamped "The Celebrated Yorkshire Relish, Goodall, Backhouse & Co.," followed by the name of the manufacturer. The defendant's article was stamped "Holbrook's Yorkshire Relish," followed by the words "Manufactured by the Birmingham Vinegar Brewery Co., Limited, Successors to Holbrook & Co., London & Birmingham." The opinions of the different judges are very elaborate and the whole case merits the examination of this Court. At page 68 the Court says: "In cases "of this description the probability of misleading not "experts or persons who know the real facts, but the "ordinary or unwary customers, is the mischief to be "guarded against."

The case of *Reddaway* v. *Banham*, then recently decided by the House of Lords, is discussed at considerable length. At the bottom of page 75 the Court says: "The "evidence plainly shows the value to the plaintiff of the "name of Yorkshire Relish. The name not only denotes "a particular kind of sauce, but it denotes the same sauce "which the plaintiff and he alone has hitherto made. "Those persons who are in the trade, or who read all "that is on the labels, know that the Yorkshire Relish "is the sauce made by the plaintiff for which he is "famous. At the same time it is true that great num-"bers of ordinary retail buyers are guided by the words "'Yorkshire Relish'; such persons do not attend to any-"thing else on the labels. So long as 'Yorkshire Relish' "are the conspicuous words, an alteration in the label does

" not attract the attention of the great majority of buyers,
" or give rise to any suspicion that the sauce with the
" altered label is not the same, or does not come from the
" same makers as that which they are accustomed to
" buy, or have been told to ask for. The evidence on
" this point is very strong, so strong that I doubt the
" possibility of any one selling sauce in ordinary round
" sauce glass bottles with Yorkshire Sauce conspicuous
" upon them without misleading the public and seriously
" injuring the plaintiff. What might happen if a rival
" maker of 'Yorkshire Relish' sold it in bottles unlike ordi-
" nary glass sauce bottles, or in some other vessel wholly
" unlike the bottles used by the plaintiff, or at prices so
" dissimilar as to attract attention, there is no evidence to
" show. Perhaps it would not be worth anybody's while
" to attempt to court a trade in Yorkshire Relish under
" such conditions. . . . The defendants have taken
" care not to imitate the plaintiff's label nor his trade-
" mark of a plate. Moreover the defendants print their
" own names in conspicuous letters on their own label.
" They have a round gilt disc instead of a round plate
" and they now sell their own sauce in pink and not white
" wrappers. In short, when both the plaintiff's and the
" defendant's sauces are looked at as they are sold the
" differences between the two are apparent enough to
" anyone whose attention is drawn to them. . . .
" But above all the words 'Yorkshire Relish' are as con-
" spicuous on the defendant's bottles as on the plaintiff's.
" The consequence is that, notwithstanding the differ-
" ences to which I have alluded, the evidence proves that
" the defendant's sauce can be and in fact is easily mis-

" taken by ordinary buyers for the sauce which the plain-
" tiff has long made and sold, and still makes and sells
" under the name of Yorkshire Relish."

Kay, Lord Justice, in giving his opinion says (p. 82) that the ordinary purchaser when he asks for an article like this by the name of Yorkshire Relish probably never notices the name of the maker at all. "The defendants " urge that the plaintiff has no right to the exclusive use " of the words 'Yorkshire Relish' and that to prevent " the defendants from using them as they are doing would " in effect be to give the plaintiff the exclusive use of " those words." The Judge then quotes from the *Stone Ale case* as follows:

"The respondents are entitled to ask that a rival manu-
" facturer shall be prevented from selling his ale under
" such a designation as to deceive the public into the
" belief that they are obtaining the ale of the respondents,
" and he ought not the less to be restrained from the
" doing so, because the practical effect of such restraint
" may be much the same as if the persons seeking the
" injunction had a right of property in a particular name."

Lord Justice Smith said at page 86, referring to the argument of the counsel:—

" Mr. Moulton when asked what it was that prompted
" his clients to take for their sauce the name 'York-
" 'shire Relish' and to give the name such prominence
" upon their wrappers and labels, and why they were not
" content to call their sauce either as 'Holbrook's Sauce'
" or 'Holbrook's Relish' or by the name of any other
" relish they might choose other than 'Yorkshire Relish'
" (and there are many other relishes known in commerce),
" at once boldly stated that the defendants' object was
" (and indeed it was obvious without his statement), to
" compete with the plaintiff in his sale of 'Yorkshire
" 'Relish' and he said that by law the defendants were

"entitled to do so, for the only right which the plaintiff "had was that no one should sell his sauce as the sauce "of the plaintiff and that what the defendants were "doing was to trade, not in Goodall, Backhouse & Co.'s "'Yorkshire Relish,' but in Holbrook's 'Yorkshire "'Relish,' and thus to do a service to the public."

At page 90 the same Lord Justice says:—

"Suppose that the words 'Yorkshire Relish' have "obtained such a significance in the market that it is "impossible, either by dressing them up or by coupling "them with other words to render them innocuous and "incapable of misleading buyers, what then? Are the "defendants entitled to take and use this old, well-known "fancy name denoting the plaintiff's goods, and thereby "filch from the plaintiff his old-established trade; or "must they leave the fancy name alone? This, in my "judgment, is the point in case. Mr. Moulton says "even so the defendant's may take the name, but I am "of opinion that this is not so, and that they must leave "the name alone if they cannot render it otherwise than "misleading to purchasers. It may be that the result "of such a state of things is that it gives the plaintiff "a practical monopoly in the words which otherwise he "would not have, and, it appears to me, so far as the "evidence in the present case goes, that this is so. "Whether it is possible to mask the words 'Yorkshire "'Relish' so that they will become innocuous, such as "by selling 'Yorkshire Relish" in jars or tins or barrels, "I do not know; but it would seem that if this be "possible, and it can be done so that the words do not "mislead, then the object which I have no doubt the "defendants have in using the words will be thereby frus-"trated. It is said that this puts the plaintiff in the same "position as if he had a registered trade mark or a "patent unexpired, but this point was dealt with by "three of the learned Lords in the House of Lords in "the *Stone Ale case*."

Montgomery v. *Thompson.*

The opinion closes as follows: "Since writing this "judgment the case of *Reddaway* v. *Banham* has been

"decided in the House of Lords. It is an *a fortiori* "case to the present, for in *Reddaway* v. *Banham* the "words 'Camel-hair Belting' were admitted to be de- "scriptive of the article sold, and not a mere fancy name "given to an article by which it has become known to "the public; and yet it was held that a rival in trade "could not use the name if by so doing he represented "his goods as the goods of another."

In the above *Yorkshire Relish case* the injunction was granted by the Court below restraining the defendant from using the name "Yorkshire Relish," unless it should do it in such a way as to plainly show that it was a compound different from the plaintiff's. The defendant appealed on the ground that it would be impossible for it to do so and use the name "Yorkshire Relish" at all, thereby giving to the plaintiff a monopoly in the name after it had been decided that he had no trade mark in that name. The discussion in the Court of Appeals by the different Judges grew out of this contention on the part of the defendant that he could not use the words "Yorkshire Relish" at all under the injunction granted by the lower court. It seems very clear that if the lower court had enjoined the use of the words "Yorkshire Relish" altogether as applied to a sauce of the kind manufactured by the plaintiff, the Court of Appeals would have sustained the judgment.

The most important case probably before any of the Circuit Courts involving the questions at issue here is that of

Pillsbury-Washburn Flour Mills Co. v. *Eagle*, 86 Fed. R. 608.

In a very elaborate opinion the Court discusses many of the authorities already cited by us. We specially refer to pages 615, 616, 617, and following. On page 620 the decision of the Court in the Improved Fig Syrup Co. is cited as an authority. Reference is made to the discussion of the *Cigarette case* on page 621, to the "*Anatolia*" *Licorice case* at page 636, where "Anatolia," a geographical name, was protected by the Court of Chancery in England. "Anatolia was the name "applied to a whole tract of country wherein licorice-"root is largely grown. At the time plaintiff began to "use the word there was no other manufacturer of "licorice stamping it with this word. Subsequently, in "response to an order for 'Anatolia' licorice, defendants "caused a stamp to be prepared containing the word "'Anatolia' and put it on the goods, and afterwards con-"tinued to use it." The court below granted a preliminary injunction restraining the use of the word "Anatolia" by the defendants on licorice. In response to the argument that the word "Anatolia" was common to all, the Court said: "That argument is merely a "repitition of the fallacy which I have frequently had "occasion to expose. The property in the word for all "purposes cannot exist, but property in that word, as "applied by way of stamp upon a particular vendible "article as a stick of licorice, does exist the moment "the article goes into the market so stamped and there "obtains acceptance and reputation, whereby the stamp "gets currency as an indication of superior quality, or "some other circumstance which renders the article so "stamped acceptable to the public."

The case of *California Fig Syrup Co.* v. *Improved Fig Syrup Co.*, 51 Fed. 296, was more in line with the foregoing decisions, than appears from the report, for in that case, though the first carton used was a close reproduction of complainants, yet the second one, the use of which was enjoined, was entirely different except as to size and name. The color was specially distinguishable; the complainants carton was a yellowish white, the defendants, red. The injunction in the case at bar was copied verbatim from the injunction in that case merely making necessary changes of names.

The *Pillsbury-Washburn Flour Mills Case*, in 86 Fed. R., already cited, refers to many authorities, in addition to those herein referred to. In

Rawlinson v. *Brainard*, 59 N. Y. Supplement, 830, the Court decided: "A manufacturer may adopt as a "trade-mark a new combination of words which up to "that time had no significance attached to them in the "trade in which they are used, . . . although they may "be suggestive of the general nature of the article to "which they are applied."

In

Bass v. *Feigenspan*, 96 Fed. 206,

the learned Judge said: "Courts should not be astute "to recognize in favor of an infringer fine distinctions "between different articles of merchandise of the same "general nature, and should resolve against the wrong-"doer any fair doubt whether the public may or may "not be deceived through the application of the spurious "symbol."

In none of these cases we have cited did the plaintiff

have a trade mark in the name sought to be protected. But in every one of them the Court enjoined the defendant from using the name because, to permit him to do so, would enable him to sell his goods as the goods of plaintiff.

PETITIONER'S BRIEF.

It is argued in the brief that the decree is erroneous because it awards an accounting. If the decree in that respect is erroneous, it is too late now for the appellant to take advantage of it in this Court, because, that fact was not assigned as error. (See pp. 586 to 589).

By looking at the order allowing an appeal and approving the bond (p. 590), it will be seen that it was upon the assignment of errors the appeal was allowed. There has been no appeal allowed from what is now claimed as an additional error of the court below. We shall therefore not investigate the correctness of counsel's contention; but we now declare that if at any time it appears by motion in the court below that the judgment is not in proper form in the respect named, we will stipulate to a modification of the judgment.

It is certain that the judgment is in the usual, customary form.

The appellant's brief has many incorrect statements and arguments deduced therefrom.

For example:

1. It is asserted over and over again that we claim a trade-mark in the name "Syrup of Figs." That claim has not at any time been made in the court below. It was not necessary to make such a claim in order to attain the relief sought, and we did not make it.

2. The statement is made in the brief that less than one-tenth of one per cent. of fig substance is in the medicine, and an elaborate argument is made upon that hypothesis. Counsel omit to say that the record here shows the use of ten times as much. They argue from the evidence in the Stearns case, 73 Fed. Rep., and assume that such is the testimony here. In fact they so state, see p. 12. They even cite at p. 12 the record at pp. 92 and 93 as supporting the statement. Read pp. 92, 93, 94, 95, 96, 97.

3. Great reliance is placed in the brief upon the evidence of George Alt. But Alt was completely discredited, pp. 501, 502, 461 *et seq.*, 565 *et seq.*, 448 *et seq.* See his cross examination, p. 352 *et seq.* He was discredited in this case and he was discredited as to his affidavit filed in the Improved Fig Syrup case before Judge McKenna, see record, p. 264. 51 Fed. R., 296.

4. Again it is stated repeatedly in the brief that from the beginning, "in 1878, up to the year 1896, a period " of eighteen years, Mr. Queen and his Company adver- " tised and stated on his labels that the preparation was " a California Liquid Fruit Remedy," etc., etc.

The quotation is from pp. 45 and 46. In the foregoing brief we have cited the record to show that it was not until 1889 that these statements were made.

5. At p. 58 counsel say the words on the label, they mean the carton, that "the juice of the fig in the com- " bination is to promote the pleasant taste, is printed in " very small and almost illegible type. Unless a person has " unusually good eye-sight he would need the aid of a " magnifying glass to decipher it." The same statement

was made in the court below. Our reply there was to ask the court to look at the carton. We make the same reply here.

6. At p. 88 the assertion is made that the Circuit Court of Appeals of the Ninth Circuit did not in 54 Fed., 175, pass on the question of fraud on the part of plaintiff. That was the principal question there as it is here and substantially same arguments *pro* and *con* were made there that are made here. The same arguments were made before McKenna Circuit Judge.

The foregoing are samples of the inaccuracies.

Judging from recollection and the hasty examination (none other has been possible in the time) of the authorities cited by appellant, we think a discussion of them is not necessary.

We conclude our argument by earnestly, but respectfully urging, that the plainest dictates of justice, as between man and man, and as between the citizen seeking the protection of the Courts, and the Courts organized and maintained for the purpose of giving that protection, require the judgment of the Court below to be affirmed. In such action, this Court will find support in a long line of decisions, rendered by men who have honored the judiciary of this country and of England.

Respectfully submitted,

WARREN OLNEY,
For Respondent.

J. G. CARLISLE,
Of Counsel.

Supreme Court of the United States.

No. 36.—October Term, 1902.

Clinton E. Worden & Company, Petitioner, *vs.* The California Fig Syrup Company, Respondent.	On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 5, 1903.]

On June 1, 1897, the California Fig Syrup Company, created under the laws of the State of Nevada, and having its principal place of business in San Francisco, California, filed a bill in equity in the Circuit Court of the United States for the Northern District of California, against Clinton E. Worden & Company, a corporation of the State of California, and against J. A. Bright, T. F. Bacon, C. J. Schmelz and Lucius Little, citizens of the State of California.

The bill alleged that, in the year 1879, one Richard E. Queen invented "a certain medical preparation or remedy for constipation and to act upon the kidneys, liver, stomach and bowels, which medical compound is a combination in solution of plants known to be beneficial to the human system, forming an agreeable and effective laxative to cure habitual constipation and many ills, depending upon a weak and inactive condition of the liver, kidneys, stomach and bowels;" that shortly after the said invention the said Queen sold and transferred all his right, title and interest in and to said medical compound, and in and to the trade name, trade marks and good will of said company to the complainant company, which has ever since been engaged in the manufacture and sale of said medical preparation or remedy; that said medical preparation has always been marked, named and called by the complainant "Syrup of Figs," that name being printed or otherwise marked upon every bottle, and also printed upon the boxes, packages or wrappers in which the bottles of the preparation were packed for shipment and sale; that the complainant and its said predecessor in interest were the first to pack and dress or mark a liquid laxative preparation in the manner illustrated by Exhibits "A" and "B" attached to the bill—that is to say, in an oblong, rectangular box or carton, with statements of the virtues of the preparation printed in different languages upon the back and sides of the carton, and on the border within which, at the top, is a representation of a branch of a fig tree, bearing fruit and leaves, surrounded by the words "Fig Syrup Company," or

"California Fig Syrup Company," and below which appear, in large letters, the words "Syrup of Figs," and below these last-named words appears a brief statement of the virtues of this preparation, together with the words "Manufactured only by the California Fig Syrup Company;" that the complainant has spent more than one million dollars in advertising said preparation, always under the name of "Syrup of Figs," or "Fig Syrup," throughout the United States and other countries, and that millions of bottles of said preparation have been sold; that, by virtue of the premises, the complainant has acquired the exclusive right to the name, "Syrup of Figs," or "Fig Syrup," as it is indifferently called by the public, or any colorable imitation of the same, as applied to a liquid laxative medical preparation irrespective of the form of bottle or package in which it may be sold to the public; that, by virtue of the premises, the complainant has acquired the exclusive right to the manner and form of packing the same for sale, in connection with the words "Syrup of Figs" or "Fig Syrup," or any colorable imitation of the same, as a part of the business name of a concern making a liquid laxative medical compound.

The bill charges that the defendant, wishing to trade to its own profit and advantage upon the reputation of the complainant's preparation, and desiring to impose a worthless production upon the public, has caused to be made, put up and sold, and offered for sale, a liquid laxative medical compound, resembling complainant's preparation, under the name "Syrup of Figs" and "Fig Syrup," and marking the boxes and packages containing the same with the name "Fig Syrup" or "Syrup of Figs," and has put the preparation, under said name, in bottles and packages or cartons, so closely in imitation of the complainant's bottles and packages, as to be likely to deceive purchasers, and so as to enable unscrupulous retail dealers to palm off defendant's preparation on the consumers as and for the complainant's preparation; and that purchasers frequently have been deceived and induced to buy the compound prepared by the defendant: that the complainant has been greatly injured in the business in the manufacture of its liquid laxative preparation "Syrup of Figs" or "Fig Syrup," and believes that it has suffered damage and injury by reason of defendant's acts to the extent of at least ten thousand dollars; that this is a continuing wrong, and one which it is impossible to exactly calculate, and one which, if permitted to continue, will work irreparable injury to the complainant.

Wherefore the complainant prayed, in its said bill, for an injunction restraining the defendant and its agents, servants, &c., from manufacturing, selling or offering for sale, directly or indirectly, any liquid laxative medical preparation, marked with the words "Syrup of Figs" or "Fig Syrup," or marked with any words which may be a colorable imitation of the name of "Syrup of Figs" or "Fig Syrup," and from putting

up, selling or dealing in any liquid laxative medical preparation which shall have a tendency to deceive the public and induce buyers to purchase defendant's preparation, believing the same to be complainant's preparation, and that defendant be perpetually enjoined from using the words "Fig Syrup Company" as a business name, or from using the words "Fig Syrup" or "Syrup of Figs" as part of its business name, in connection with the manufacture and sale of a liquid laxative preparation. The complainant also prayed for an account for damages to complainant and for gains and profits derived by the defendant company, and for such other and further relief as may be agreeable to equity and good conscience.

The defendant company and the other defendants filed a joint and several answer, admitting many of the allegations of the bill, but denying and putting the complainant on proof of those which alleged any intentional or actual appropriation by the defendant company of proprietory or business rights of the complainant. The answer proceeded to make the following allegations:

"And, for a separate and further defense, these defendants aver, upon their information and belief, that the preparation made and sold by complainant under the name of 'Syrup of Figs' does not and never did contain any syrup of figs or any fig syrup; or any juice of figs or any part or portion or quantity of figs in any form; and that the name 'Syrup of Figs' and 'Fig Syrup' and the name of the company, 'The California Fig Company,' and the form and appearance of the labels and the pictures on the labels, and the statements on the labels adopted and used by complainant in connection with its liquid laxative medicine, were all designed, adopted and used with the deliberate intent and purpose to deceive the public and the user of the medicine and to perpetrate a fraud upon them by inducing them to believe that the preparation contained figs in some form, and that by reason thereof the said medicine, derived its laxative properties and also a pleasant and agreeable taste; that the complainant has been successful in perpetrating the said fraud upon the public and for years last past has perpetrated said fraud by wholesale and have induced the public generally throughout the world to believe the statements aforesaid concerning the said medicine and its connection with figs, and thereby complainant has made and realized large profits, gains and advantages from the sale of said medicine, all of which was caused and which accrued and were made by reason of said false, fraudulent and deceptive statements; that, as a matter of fact the said so-called 'Syrup of Figs,' sold by complainant, consists of the ordinary and well-known laxative called senna as a basis, together with certain aromatic carminatives added for the purpose of giving it a pleasant and agreeable taste, as a cure to the naturally griping effect of senna when taken alone; that in order to sell such a compound complainant made the false, fraudulent and fictitious statements hereinabove charged against it, and was enabled to sell the same solely by virtue of said false, fraudulent and fictitious statements, and said complainant has built up its business and its trade upon the strength of and by virtue of the said false, fraudulent and fictitious statements, for which reason complainant is not entitled to relief in a court of equity."

The cause was put at issue by a replication filed by the complainant company. Pending the trial an application for a preliminary injunction was made, which was allowed upon the ground that the complainant had made such a showing by the pleadings and affidavits that it was entitled to an injunction against the sales of "Fig Syrup" by the defendant. (86 Fed. Rep. 212.)

A large amount of evidence was taken, and, on June 7, 1899, a decree was entered by the Circuit Court perpetually enjoining the defendant company and the other defendants from making, selling or offering to sell any liquid laxative medicine or preparation under the name of "Syrup of Figs" or "Fig Syrup," or under any name in colorable imitation of the name "Syrup of Figs," and from making, selling or offering to sell any medical liquid laxative preparation, put up in bottles, boxes or packages similar in form or arrangement to the bottles or packages used by the complainant in the manufacture and sale of its said liquid laxative preparation, or so closely resembling the same as to be calculated to deceive the public, and from using the name "Fig Syrup Company," and from using a name whereof the words "Fig Syrup," or "Syrup of Figs Company," form a part as a business name in connection with the manufacture of a liquid laxative preparation. (95 Fed. Rep. 132.)

There was an appeal to the Circuit Court of Appeals for the Ninth Circuit, where the decree of the Circuit Court was affirmed, Ross, C. J., dissenting. (103 Fed. Rep. 334.)

The cause was then brought to this court by a writ of certiorari allowed on November 20, 1900.

Mr. Justice SHIRAS delivered the opinion of the Court.

The courts below concluded, upon the evidence, that the defendants sold a medical preparation named, marked and packed, in imitation of the complainant's medicine, for the purpose and with the design and intent of deceiving purchasers and inducing them to buy defendant's preparation instead of the complainant's. We see no reason to dissent from that conclusion, and if there were no other questions in the case, we should be ready to affirm the decree, awarding a perpetual injunction and an account of the profits and gains derived from such unfair and dishonest practices.

Another ground, however, is urged against the complainant's right to invoke the aid of a court of equity, in that the California Fig Syrup Company, the complainant, has so fraudulently represented to the public the nature of its medical preparation that it is not entitled to equitable relief.

Some courts have gone so far as to hold that courts of equity will not interfere by injunction in controversies between rival manufacturers and dealers in so-called quack medicines. (*Fowle* v. *Spear*, Circuit Court of the United States for the Eastern District of Pennsylvania, Pennsylvania Law

Journal, vol. 7, p. 176; *Heath* v. *Wright*, 3 Wall. Jr. 141; *Fetridge* v. *Wells*, 4 Abb. Pr. 144.)

It may be said, in support of such a view, that most, if not all, the States of this Union have enactments forbidding and making penal the the practice of medicine by persons who have not gone through a course of appropriate study, and obtained a license from a board of examiners; and there is similar legislation in respect to pharmacists. And it would seem to be inconsistent, and to tend to defeat such salutary laws, if medical preparations, often and usually containing powerful and poisonous drugs, are permitted to be widely advertised and sold to all who are willing to purchase. Laws might properly be passed limiting and controlling such traffic by restraining retail dealers from selling such medical preparations, except when prescribed by regular medical practitioners.

But we think that, in the absence of such legislation, courts cannot declare dealing in such preparations to be illegal, nor the articles themselves to be not entitled, as property, to the protection of the law.

We find, however, more solidity in the contention, on behalf of the appellants, that when the owner of a trade mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade mark, or in his advertisements and business, be himself guilty of any false or misleading representation; that if the plaintiff makes any material false statement in connection with the property which he seeks to protect, he loses his right to claim the assistance of a court of equity; that where any symbol or label claimed as a trade mark is so constructed or worded as to make or contain a distinct assertion which is false, no property can be claimed on it, or, in other words, the right to the exclusive use of it cannot be maintained.

Among the cases cited to sustain this contention are the following:

In *Cornell* v. *Reed*, (128 Mass. 477,) the plaintiff sought to establish the exclusive right to the words "East Indian," as applied to his remedy, and the court, through Gray, C. J., said:

"The conclusive answer to this suit is, that the plaintiff has adopted and used these words to denote, and to indicate to the public, that the medicines were used in the East Indies, and that the formula for them was obtained there, neither of which is the fact. Under these circumstances, to maintain this bill would be to lend the aid of the court to a scheme to defraud the public."

In *Siegert* v. *Abbott*, (61 Md. 276,) where the subject matter of the trade mark was "Angostura Bitters," which purported to have been prepared by Dr. Siegert, at Angostura, Trinidad, and where it appeared that Dr. Siegert was dead, and had never lived at Angostura, the bill was dismissed, the court saying: "It is a general rule of law, in cases of this

kind, that courts of equity will not interfere by injunction where there is any lack of truth in the plaintiff's case; that is, where there is any misrepresentation in his trade mark or labels."

In *Alden* v. *Gross*, (25 Mo. App. 123,) a trade mark was claimed in the words "Fruit Vinegar," and the court said:

"The vinegar was not manufactured out of fruit, in the plain, ordinary, usual sense of that term, but out of low wines distilled from cereals, and fruit enters into its composition only to a very insignificant extent. . . . It would be a novel application of the rule governing the subject of trademarks if one who manufactures vinegar out cereals could appropriate for the article thus manufactured the word 'Fruit,' and thereby exclude another from using the word as descriptive of an article which is, in point of fact, manufactured out of fruit. . . But whether the word 'Fruit' in this connection is purely indicative of the character or quality of the article or not, the plaintiff's exclusive claim to it must fail on the further ground that the use of the word, in that connection, is alone deceptive."

In *Prince Manufacturing Company* v. *Prince's Metallic Paint*, (135 N. Y. 24,) an injunction to protect a trade mark was refused, by reason of a false representation as to the place from which the ore was obtained, and the Court of Appeals used the following language:

"Any material misrepresentation in a label or trade mark as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity. The courts do not, in such cases, take into consideration the attitude of the defendant. . . . And, although the false article is as good as the true one, 'the privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce.'"

English cases are to the same effect. Thus in *Pidding* v. *How*, (8 Simons, 477,) where it appeared that the plaintiff had made a new sort of mixed tea, and sold it under the name of "Howqua's Mixture," but, as he had made false statements to the public, as to the teas, of which his mixture was composed, and as to the mode in which they were procured, the court refused to restrain the defendant from selling tea under the same name, and said:

"As between the plaintiff and the defendant, the course pursued by the defendant has not been a proper one; but it is a clear rule, laid down by courts of equity, not to extend their protection to persons whose case is not founded in truth. And, as the plaintiff, in this case, has thought fit to mix up that which may be true with that which is false, in introducing his tea to the public, my opinion is, that, unless he establish his title at law, the court cannot interfere on his behalf."

The English case of *Leather Cloth Co.* v. *American Leather Cloth Co.* is a leading one on this subject and in which the nature of false representations that will defeat the right of the owner of a trade mark to protection in equity was much considered.

A bill, asking for an injunction against defendants who were charged with using stamps and trade marks, so similar to those of the complainant as to deceive purchasers, was sustained by Vice Chancellor Wood, who granted the injunction prayed for. (1 Hem. & Miller's Reports, 271.) On appeal the decree of the Vice Chancellor was reversed by the Lord Chancellor, and the complainant's bill was dismissed. (4 De Gex, J. & S. 136.)

The conclusions reached by Lord Chancellor Westbury were that there is a right of property in a trade mark, name or symbol in connection with a particular manufacture or vendible commodity, but that where the owner of such a trade mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade mark or in the business connected with it be himself guilty of any false or misleading representation. In considering what constitutes a material false representation, the Chancellor observed that he could not receive it as a rule, either of morality or equity, that a plaintiff is not answerable for a falsehood, because it may be so gross and palpable as that no one is likely to be deceived by it; that if there be a willful false statement, he would not stop to inquire whether it be too gross to mislead.

This decision was affirmed by the House of Lords. (11 H. L. Cas. 523.) In that tribunal, in the several opinions of the law lords, the views of the Lord Chancellor as to the effect of false representations were approved, but it was thought that, independently of that question, the plaintiff was not entitled to an injunction, because the rival or antagonistic trade mark of the defendants did not sufficiently resemble that of the plaintiff's as to be calculated to deceive the public.

In *Fetridge* v. *Wells*, (13 How. Pr. 385,) the plaintiff sold a soap under the name of "Balm of a Thousand Flowers," and in denying the plaintiff's right to the exclusive use of these words as a trade mark, Judge Duer said:

"I am fully convinced that that the name 'Balm of a Thousand Flowers' was invented, and is now used, to convey to the minds of purchasers the assurance that the highly scented liquid to which the name is given is, in truth, an extract or distillation from flowers, and therefore not merely an innocent, but a pleasant and salutary preparation. Not only is this the meaning that the words used naturally suggest, but in my opinion it is that which they actually and plainly express and were designed to convey. . . . Let it not be said that it is of little consequence whether this representation be true or false. No representation can be more material than that of the ingredients of a compound which is recommended and sold as a medicine. There is none that is so likely to induce confidence in the application and use of the compound, and none that, when false, will more probably be attended with injurious, and perhaps fatal, consequences. . . . Those who come into a court of equity, seeking

equity, must come with pure hands and a pure conscience. If they claim relief against the frauds of others, they must themselves be free from the imputation. If the sales made by the plaintiff and his firm are affected, or sought to be, by misrepresentation and falsehood, they cannot be listened to when they complain that, by the fraudulent rivalry of others, their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character."

In *Manhattan Medicine Co.* v. *Wood*, (108 U. S. 218,) the case of *Fetridge* v. *Wells* was cited with approval, and likewise the English cases of *Pidding* v. *How*, (8 Simns. 477,) and *The Leather Cloth Company* v. *The American Leather Company*, (4 De Gex, J. & S. 137.) In *Manhattan Medicine Co.* v. *Wood*, the complainant claimed to be the owner of a patent medicine and of a trade mark to distinguish it. The medicine was manufactured by the complainant in New York; the trade mark declared that it was manufactured by another person in Massachusetts. The Circuit Court of the United States for the District of Maine, per Mr. Justice Clifford, *held*, that the complainant, owing to false statements in his trade mark, was entitled to no relief against a person using the same trade mark in Maine, and dismissed the bill. On appeal this decree was affirmed, this court saying: "A court of equity will extend no aid to sustain a claim to a trade mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser of the medicine."

In *Clotworthy* v. *Schepp*, (42 Fed. Rep. 62,) the right to a trade mark was claimed in the word "Puddine," in connection with the words "Rose" and "Vanilla," but Circuit Judge Lacombe refused an injunction, and in his opinion said: "The complainant himself is engaged in deceiving the very public which he claims to protect from the deception of others. He calls his preparation 'fruit' puddine. In nine different places on his package this word 'fruit' is repeated as descriptive of the article, and a dish of fruit (pears, grapes, &c.) is most prominently depicted on one face of each packet. His packages plainly suggest that fruit of some kind enters in some shape in his compound. A chemical analysis produced by the defendant, the substantial accuracy of which is not disputed, discloses the fact that his 'Puddine' is composed exclusively of corn starch, a small amount of saccharine matter, and a flavoring extract, with a little carmine added to give it color. It contains no fruit in any form."

Krauss v. *Peebles' Sons Co.*, (58 Fed. Rep. 585,) was a case in which it was shown that the liquor sold as "Pepper Whisky" was in fact a mixture of Pepper whisky and other whiskies, and an injunction to prevent

infringement was refused by Circuit Judge Taft, who, in his opinion, said: "To bottle such a mixture, and sell it, under the trade label and caution above referred to, is a false representation, and a fraud upon the purchasing public. A court of equity cannot protect property in a trade mark thus fraudulently used."

And this doctrine of the English and American cases above referred to has been applied in the Federal Circuit Courts and Circuit Courts of Appeals in cases in which the California Syrup Company, the complainant in the present case, was a party.

In the Circuit Court of the United States for the District of Massachusetts, March 6, 1895, the California Fig Syrup Company, the complainant in the present case, filed a bill against Kate Gardiner Putnam and others to restrain the infringement of the plaintiff's trade mark. The facts of the case were thus stated by Circuit Judge Colt in his opinion, reported in 66 Fed. Rep. 750:

"The plaintiff is the proprietor and manufacturer of a liquid laxative compound called 'Syrup of Figs.' The defendants manufacture and sell a laxative medicine which they term 'Fig Syrup.' There is no evidence that the defendants have imitated the plaintiff's labels or packages except in this particular. If this preparation is in fact a syrup of figs, the words are clearly descriptive, and not the proper subject of a trade mark. Upon this point the contention of the plaintiff is that its preparation is not a syrup of figs, since it contains only a very small percentage of the juice of the fig; that the laxative ingredient in it is senna; that while the fig in the form of fruit may have laxative properties arising from the seeds and skin, the fig in the form of syrup is no more laxative than any other fruit syrup; that it follows from these facts that these words, as applied to this compound, are not descriptive, but purely fanciful, and therefore constitute a valid trade mark. The evidence shows that the compound is not a syrup of figs. It might more properly be termed a 'Syrup of Senna,' if the words were intended to be descriptive of the article. But, assuming this is not a syrup of figs, we are met with the inquiry whether these words, as applied to this preparation, are not deceptive. The label on every bottle reads as follows: 'Syrup of Figs, the California Liquid Fruit Remedy, Gentle and Effective.' On the sides of each bottle are blown the words 'Syrup of Figs,' and on the back the words 'California Fig Syrup Company, San Francisco, Cal.' On the face of every package is a picture of a branch of a fig tree with the hanging fruit, surrounded with the words 'California Fig Syrup, San Francisco, Cal.;' and beneath this the words 'Syrup of Figs presents in the most elegant form the laxative and nutritious juice of the figs of California.' . . . Thus we see that the leading representation on the labels, packages and in the advertisements of this preparation is that it is a laxative fruit syrup made from the juice of the California fig. . . . The popularity of this medicine arises from the belief in the mind of the ordinary purchaser that he is buying a laxative compound, the essential ingredient of which is the California fig, whereas, in fact, he is buying a medicine the active property of which is

senna. The ethical principle on which the law of trade marks is based will not permit of such deception. It may be true, as a scientific fact known to physicians and pharmacists, that the syrup of figs has little or no laxative property; but this is not the belief of the general public. They purchase this preparation on the faith that it is a laxative compound made from the fruit of the fig, which is false. This is not an immaterial representation the effect of which is harmless, but it is a representation which goes to the very essence of the plaintiff's right to a trade mark in these words. The cases are numerous where the courts have refused to grant relief under these circumstances."

Accordingly, the Circuit Court dismissed the bill with costs. On appeal to the Circuit Court of Appeals for the First Circuit the decree of the Circuit Court was affirmed.

In the Circuit Court of the United States for the Eastern District of Michigan, April 1, 1895, the California Fig Syrup Company filed a bill, seeking to restrain Frederick Stearns & Company from infringing complainant's trade mark. The court declined to grant an injunction and dismissed the bill with costs, holding that the words "Syrup of Figs" or "Fig Syrup," if descriptive of a syrup, one of the characteristic ingredients of which is the juice of the fig, cannot be sustained as a valid trade mark or trade name, and that, under the facts of the case, the use of the name "Syrup of Figs, in connection with a description of the preparation as a fruit remedy, nature's pleasant laxative," applied to a compound, whose active ingredient is senna, and containing but a small proportion of fig juice, which has no considerable laxative properties, is deceptive and deprives one so using it of any claim to equitable relief.

On appeal to the Circuit Court of Appeals of the Sixth Circuit the decree of the Circuit Court was affirmed. (73 Fed. Rep. 812.) In his opinion Circuit Judge Taft, after stating that the term "Syrup of Figs," if intended to describe the character of the article concerted, could not be used as a trade mark, proceeded to say:

"But the second ground presented, and that upon which the court below rested its decision, prevents the complainant from having any relief at all. That ground is that the complainant has built up its business and made it valuable by an intentional deceit of the public. It has intended the public to understand that the preparation which it sells has, as an important medicinal agent in its composition, the juice of California figs. This has undoubtedly led the public into the purchase of the preparation. The statement is wholly untrue. Just a suspicion of fig juice has been put into the preparation, not for the purpose of changing its medicinal character, or even its flavor, but merely to give a weak support to the statement that the article sold is syrup of figs. This is a fraud upon the public. It is true that it may be a harmless humbug to palm off upon the public as syrup of figs what is syrup of senna, but it is nevertheless of such a character that a court of equity will not encourage it by extending

any relief to the person who seeks to protect a business which has grown out of and is dependent upon such deceit.

"It is well settled that if a person wishes his trade mark property to be protected by a court of equity, he must come into court with clean hands, and if it appears that the trade mark for which he seeks protection is itself a misrepresentation to the public, and has acquired a value with the public by fraudulent misrepresentations in advertisements, all relief will be denied to him. This is the doctrine of the highest court of England, and no court has laid it down with any greater stringency than the Supreme Court of the United States. (*Medicine Co.* v. *Wood*, 108 U. S. 218; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De Gex, J. & S. 137.)

"The argument for complainant is, that because fig juice or syrup has no laxative property everybody ought to understand that when the term is used to designate a laxative medicine it must have only a fanciful meaning. But the fact is admitted that the public believe that fig juice or syrup has laxative medicinal properties. It is to them that the complainant seeks to sell its preparation, and it is with respect to their knowledge and impressions that the character, whether descriptive or fanciful, of the term used, is to be determined."

The counsel of the appellee in the present case do not contend that the courts of the Second and Sixth Circuits were wrong in denying the complainant any relief upon the cases as presented in those courts. They do contend that those cases were argued upon a wrong theory by the counsel of the complainant. The language of the brief in this regard is as follows:

"Here was where complainant made a mistake. Acting under advice of able counsel, it claimed the name 'Syrup Figs' to be a technical *trade mark*, when all that was necessary to claim was that it constituted a *trade name*. Able counsel in the Second and Sixth Circuits pressed injunction suits against infringers on the theory that complainant had a trade mark in the name, and that the statement on the cartons and bottles was immaterial. He did not address himself to showing that the name 'Syrup of Figs' came to be honestly and properly applied to the product as largely descriptive of the ingredients of the medicine. He was so afraid of ruining his case as a case of trade marks, by showing that it was descriptive, that he did not prove what was prove in the case now at bar, viz., that figs were at the time the name was given an important part of the composition."

We are not much impressed with the force of this attempted distinction. Even if it were true that, at the time the medicine in question was first made and put upon the market, the juice of figs was so largely used as one of the ingredients, as to have warranted the adoption of the name "Syrup of Figs" as descriptive of the nature of the medicine, that would be no justification for continuing the use of the term after the manufacturers and vendors of the medicine ceased to use fig juice as a material ingredient. Even if the term was honestly applied in the first instance, as descriptive, it would none the less be deceptive and misleading when, as is shown in the present case, it ceased to be a truthful statement of the nature of the

compound. Nor are we disposed to concede that, under the evidence in the present case, the term "Syrup of Figs" or "Fig Syrup" was properly used as descriptive of the nature of the medicine when it was first made. Then, as now, the operative laxative element was senna, and the addition of fig juice was, at the best, experimental, and apparently was intended to attract the patronage of the public by holding out the name of the medicine as "Syrup of Figs."

However that may be, it is now admitted that the use of figs was found to be deleterious, and their use, as a substantial or material ingredient, was abandoned. The following extracts are taken from the testimony of the inventor of the medicine now made and sold by the California Fig Syrup Company:

"During the year 1878 I made many experiments with the idea of producing a pleasant, effective, liquid laxative, having observed that many people dislike to take pills, oils and other disagreeable medicines; and, after many experiments and study of laxatives in general, came to the conclusion that senna was the best general laxative known, but that the preparations then on the market were either weak in effect or griping in their nature, and I thought that if I could make a liquid preparation of senna which would be really pleasant to the taste and free from griping qualities that it would answer the purpose. And at that time I also thought that certain other medicinal agents should be combined with the senna, and some of those medicinal agents were not very pleasant to the taste. And I thought of figs as a fruit that would afford me a considerable quantity of sugar and mucilaginous substance to counteract the unpleasant taste of the medicinal agents. And I used figs freely in my experiments for that purpose. As I progressed with my experiments I found or determined as a result of my experiments and studies that a uniformity and stability of product were of great importance, and that the fig substance was not conducive to those qualities, and that it had a strong tendency to ferment, and therefore it would be better to use a small quantity. I also found that those medicinal agents which were unpleasant to the taste were better adapted to special cases than to general use, and concluded to omit them, and therefore did not need as large a quantity of fig substance as formerly. As finally prepared I had a new and original compound, of which the fig syrup formed a very small but pleasant part, although not an essential part of the combination; that is, I might have used an equal quantity of honey, or some other substance, instead of the fig substance, without changing the character and effect of the combination. . . . I desired to give a name which would be new and original to distinguish my product from all the laxative medicines, and which would be pleasantly suggestive, and, after thinking over a number of names, I decided to use the name 'Syrup of Figs.' I knew that I was not using the name generically, because figs did not give character and effect to the combination."

On cross examination this witness further stated that "we still use figs when we might use some other pleasant substance, because we first started to use figs; and the fig substance, while it is used, is not an essential part

of the compound or what I would call an essential part of the compound. That is, not a part of the compound which gives to it its distinctive aromatic and medicinal qualities."

That the complainant company, years after it had established a popular demand for its product, issued statements in medical journals and newspapers and circulars, that the medical properties of their compound were derived from senna, does not relieve it from the charge of deceit and misrepresentation to the public. Such publications went only to giving information to wholesale dealers. The company by the use of the terms of its so-called trade mark on its bottles, wrappers and cartons continued to appeal to the consumers, out of whose credulity came the profits of their business. And, indeed, it was the imitation by the defendants of such false and misleading representations that led to the present suit.

The bill in the present case contains the following allegations:

"Your orator further states that this laxative medical compound, or preparation, made and put up as aforesaid by your orator, has always been marked, named and called by your orator 'Syrup of Figs,' being advertised by your orator under that name, the name 'Syrup of Figs' being printed or otherwise marked upon every bottle of this preparation made and sold by your orator—this name being also printed upon the boxes, packages or wrappers in which the bottles of this preparation are packed for shipment and sale; that it has been the practice of your orator to put the bottles containing this preparation in oblong pasteboard boxes or cartons, so that they will reach the consumer in that form; that in all instances, not only the bottle which contains this preparation, but the box or carton which contain the bottles of this preparation, is marked with the words 'Syrup of Figs' and also contains printed matter stating that this preparation is a medical laxative preparation, and also giving a general idea of its uses and purposes. . . . Your orator further states that it and its said predecessor in interest were the first to pack and dress or mark a liquid laxative preparation or medicine in the manner illustrated by Exhibits "A" and "B"—that is to say, in an oblong, rectangular box or carton, with statements of the virtues of this preparation printed in different languages upon the back and sides of the carton, and having on the front of the carton and on the border within which, at the top, is a representation of a branch of a fig tree, bearing fruit and leaves, surrounded by the words 'Fig Syrup Company,' or 'California Fig Syrup Company,' and below which appear, in larger letters, the words 'Syrup of Figs.'"

Upon such allegations and the admissions of the complainant's principal witness, some of which are hereinbefore quoted, and upon the entire evidence in the case, and in the light of the authorities cited by the counsel of the respective parties, our conclusions are that the name "Syrup of Figs" does not, in fact, properly designate or describe the preparation made and sold by the California Fig Syrup Company, so as to be susceptible of appropriation as a trade mark, and that the marks and names, used upon the bottles containing complainant's preparation, and upon the

cartons and wrappers containing the bottles, are so plainly deceptive as to deprive the complainant company of a right to a remedy by way of an injunction by a court of equity.

Accordingly, the decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed, and the cause is remanded to that court with directions to dismiss the bill of complaint.

Mr. Justice McKenna dissented.

True copy.

Test:

Clerk Supreme Court, U. S.